1930

HAJI RAHIM BUX v. MAIKU.

handed back to him on that date so that he could file his appeal, even though the copy of the judgment was detained for the payment of the additional 6 annas. It would in my opinion save litigants from harassment if in such cases the Copying Department proceeded with the preparation of the decree without waiting for the judgment. After all the fee has been paid and there can be no objection to the granting to the applicant a copy of his decree, irrespective of the fact that he wishes to file an appeal. I see no justification for withholding the copy of the decree until the copy of the judgment also is prepared. In this case I consider that if there has been any negligence on the part of the appellant it should be condoned. I, therefore, allow this appeal and direct the learned District Judge to admit the appeal against the decision of the Munsif. As this appeal is not opposed there will be no order as to costs.

Pullan, J.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

1930
December, 8.

KING-EMPEROR (COMPLAINANT-APPELLANT) v. NARAIN (ACCUSED-RESPONDENT).*

Confession—Subsequent retraction—Confession not of any value in evidence—Conviction, if justified—Sessions Judge and assessors holding confession to be untrue—Appellate court's power to interfere—Some evidence against accused but every item open to reasonable suspicion—Acquittal, whether to be set aside—Lists of stolen property prepared before actual commencement of investigation—Exclusion of such lists from evidence.

Held, that lists of stolen property prepared while the investigation is merely in a preliminary stage are mere additions to the first report which were necessary for the proper presentation of the case by the complainant to enable the

*Criminal Appeal No. 475 of 1930, against the order of S. Asghar Hasan, Sessions Judge of Hardoi, dated the 12th of September, 1930.

police to make a full investigation, and these lists must be considered to have been prepared before the investigation actually began and they cannot be excluded from evidence as being statements made to a police officer during the course of investigation. *Autar* v. *King-Emperor* (1), relied on.

Where except the fact that an accused has chosen to admit his own guilt there is nothing in the confession which is of any value in evidence, such a confession subsequently retracted is not sufficient in itself to justify the conviction of the person making it and if the Sessions Judge and his assessors hold such a confession to be untrue an appellate court cannot say that the Judge and the assessors were wrong.

Where there is some evidence against an accused and it cannot be said that the man is necessarily innocent, but every item in the evidence against him is open not only to suspicion but to a reasonable suspicion, which might lead a careful Judge to doubt the truth of the story contained in his own retracted confession, his acquittal cannot be set aside.

The Government Advocate (Mr. *H. K. Ghose*), for the Crown.

Mr. *Moti Lal Saksena*, for the respondent.

RAZA and PULLAN, JJ :—This is an appeal preferred by the Local Government against the acquittal of one Narain Chamar of the offence of dacoity by the learned Sessions Judge of Hardoi. The first ground taken by the learned Public Prosecutor before us is that "the order of acquittal is wrong as the guilt of the accused is proved beyond doubt, by his own confession, corroborated by simple evidence and conduct of the accused." Had the learned Public Prosecutor been able to substantiate this ground of appeal it would have been possible for this Court to set aside the order of acquittal on the ground that it was contrary to the evidence and as such perverse. We have gone very carefully into all those points which were raised by the prosecution against this man and more particularly into the three points which have been pressed by the

(1) (1930) 7 O.W.N., 456.

1930

KING-EMPEROR v. NARAIN.

learned Public Prosecutor and we have come to the following definite conclusions. The case is one in which there is some evidence against the accused Narain. We are not prepared to say that the man is necessarily innocent, but as we shall point out every item in the evidence against him is open not only to suspicion but to a reasonable suspicion, which might (in our opinion) lead a careful Judge to doubt the truth of the story contained in his own retracted confession and as the learned Public Prosecutor says "corroborated by simple evidence and conduct of the accused." A dacoity took place in the village of Nayagaon on the night of 2nd/3rd of January, 1930, and was reported at 5 a.m. on the 3rd of January. A police officer went at once to the village and in his presence certain lists of stolen property were prepared. On the 5th of January two lists were completed : one containing 35 items of pawned property and the other showing 23 items of personal property belonging to the complainant. A further list of stolen cloth was prepared on the 11th of January; but with that we are not concerned. The very fact that one of the items, namely, no. 35 in the list of pawned property includes 26 *Hamels* gives some idea of the difficulty which must have been experienced in the preparation of these lists, and it is in no way surprising that the two principal lists were not ready till the 5th of January. By that time the investigation was merely in a preliminary stage and these two lists are in our opinion mere additions to the first report which were necessary for the proper presentation of the case by the complainant to enable the police to make a full investigation, and we consider that these lists were prepared before the investigation actually began and they cannot be excluded from evidence as being statements made to a police officer during the course of investigation. This is the view which has already been taken by us in the case

Raza and Pullan, JJ.

of *Autar* v. *King Emperor* (1), and we consider that the learned Sessions Judge was wrong in excluding this piece of evidence.

No clue was found to the perpetrators of this dacoity until the 24th of February, when the house of Narain Chamar was searched in connection with some other theft. At the search a sword was recovered by Sub-Inspector Mahabir Prasad who was conducting the investigation into this Nayagaon dacoity. He has himself stated that when he found the sword he suspected that it might have been the sword contained in the second list of the stolen property, but he did not immediately arrest Narain. On the contrary he left him at large until the 28th of February when he sent for him to a village in which he was conducting another investigation. On the 1st of March, he arrested Narain and had him taken to Hardoi where on the 2nd of March after being duly cautioned he made a confession to Mr. Nigam, Joint Magistrate. On the 9th of March, Narain was put up in jail for identification by 28 witnesses and it appears that he was identified by 15. The others did not identify him but they identified none of the other five persons with whom he was mixed in the jail. On the 11th of March, Narain went out with a Magistrate and pointed out certain places which had been mentioned by him in his confession. On the 15th of March, he produced from a field near his village certain silver ornaments. On the 18th of March, he identified before a Magistrate the sword which is now before us as being a sword which was recovered from his house by the police. On the information given by Narain certain other persons were arrested but none were put upon their trial. Another person named Bhup was tried along with Narain for being in possession of stolen property, but he was not one of these persons named by Narain and

(1) (1930) 7 O.W.N., 456.

1930

KING-EMPEROR v. NARAIN.

he also has been acquitted. Narain retracted his confession saying that he had been induced to make it by the police.

Raza and Pullan, JJ.

Thus the evidence against Narain is in the first place his own confession, in the second the recovery of the sword from his house, thirdly there is the recovery of the ornaments from the field, fourthly we have the fact that he showed certain places to a Magistrate which he had mentioned in his confession, and fifthly we have his identification in jail. The learned Public Prosecutor placed no reliance on the fact that Narain showed certain places to the Magistrate because there is no confirmation of his statement that he or his gang ever went to those places. Nor does he lay much stress on the recovery of the silver ornaments from the field. None of these ornaments have been identified as part of the stolen property and Narain in his confession said that he and Inda each received Rs. 25 in cash and all the rest of the property was divided among the other members of the gang. Thus on his own showing Narain received none of the stolen property and there is no reason to suppose that the property which he produced from his field was in any way connected with this dacoity.

As to the confession it is one of those confessions which adds nothing to the knowledge already possessed by the police. It is true that Narain named certain confederates, but there is no corroboration of the fact that any of those persons took part in the crime. The clues, which he gave, such as the fact that he purchased some candles in the presence of a witness whom he named and that the gang rested at a Faqir's hut and were seen there by two persons, were not substantiated by any evidence, and except that Narain has chosen to admit his own guilt there is nothing in the confession which is of any value in evidence. Such a confession which has been subsequently retracted is not

1930

KING-EMPEROR v. NARAIN.

in our opinion sufficient in itself to justify the conviction of the person making it and if a learned Sessions Judge and his assessors held such a confession to be untrue we cannot as an appellate court say that the Judge and the assessors were wrong. We must therefore look to the corroboration of that confession contained in the identification proceedings and in the evidence relating to the recovery of the sword.

Raza and Pullan, JJ.

In the second list of stolen property a sword is mentioned. It is described as *talwar tin goladar—nok par dono taraf dhar—mian par kala kapra charha hua.* This may be translated: a sword with three *golas*—the point sharpened on both edges—the scabbard covered with black cloth. What is meant by "gola" we cannot say with certainty, but the word may refer to certain circular ornaments on the hilt. This list was given to Sub-Inspector Nur-ul-Hasan who was the junior officer and was given by him to his senior Sub-Inspector Mahabir Prasad. Sub-Inspector Mahabir Prasad conducted the search of Narain's house and he described the sword in the following words:—*ek qabza talwar ahini tin goladar jiske upar tin lakirain bani hain aur nok par dono taraf dhar hai aur mian jiska siah parmatta ka hai.* The translation of this is: one iron sword having three *golas* and upon which are three lines engraved, the point is sharpened on both edges and the scabbard is covered with black paramatta (cloth). The extraordinary similarity between these descriptions cannot pass unnoticed. We have already stated we do not know the exact meaning of the word "tin goladar" and yet it occurred to both the owner of the sword stolen and the investigating officer who found the sword at the house of Narain. Secondly, the description of the point sharpened at both edges is given in identical words both in the complainant's list and in the search list, and thirdly the word used for scabbard is not the ordinary word used in villages.

1930

KING-EMPEROR v. NARAIN.

Raza and Pullan, JJ.

Even in Urdu the usual word is *mian* and Hind-speaking villagers would be more likely to use the word *kathi*. The word *mian* is high Persian. The only conclusion at which we can arrive is that the list was prepared with the aid of some Persian knowing person and that it was so well known to the Sub-Inspector who conducted the search that he automatically repeated the very same words in his own search list. We do not wish to suggest any malpractice on the part of the police officer concerned but this appears to us to be a reason not mentioned by the learned Judge which might have confirmed him in the view which he took. He himself lays stress on another point. When this sword was placed for identification before the village witnesses it was the only sword shown to them which had a black scabbard and it was the only sword shown to them to which a leather sling was attached. The learned Judge pointed out that this leather sling was removed before the sword was brought to Court; and he cannot be blamed if he drew an unfavourable conclusion from these facts. We also observe that Sub-Inspector Mahabir Prasad in his statement in Court said "There were neither door leaves nor *pharka* by which the door could be barred at the house in which the sword was found. In the absence of the inmates of the house anybody could reach the sport where the sword was lying." In our opinion these words are in direct contradiction of the words contained in the search list showing that the sword was found in a safe place. The sword was hidden between a grainbin and a wall, but that is not a safe place if any person can come in and place it there. For these reasons we cannot accept the finding of this sword as strong corroboration of the fact that Narain took part in this dacoity; and he himself in his confession never suggested that the sword was part of the stolen property and the way in which he mentions it in his confession cannot fail to arouse suspicion. He was describing the dacoity and he was

1930

KING-EMPEROR v. NARAIN.

Raza and Pullan, JJ.

at the stage where the dacoits had arrived at the house and said "We are dacoits and we would commit dacoity." He then interpolated in his narrative the following words: "I have forgotten one thing. It is this that 19 days ago Gopal gave me a sword." He then went on to describe the dacoity. Now according to his own statement the sword was given to him one month and a half after the dacoity took place, and his mention of it at this stage in his confession only gives rise to the conclusion that this was something he had been told to say and that he was afraid he might forget it altogether. Even when asked by the learned Magistrate what other property was looted besides the money, and we suppose the question was put in order to give an opening for a mention of arms, Narain replied "Clothes, blankets, gold and silver ornaments." In our opinion Narain never meant to imply that this sword was part of the stolen property. All that he said was that it was given to him by one of the dacoits long after the dacoity to protect his fields from pigs. We feel that the learned Judge was right in discarding the evidence of the sword in this case.

There remains the identification. Here again we do not wish to make any allegations against the investigating officer, but we must observe that in our experience such a complete identification as this is unknown. This man is supposed to have taken part in a dacoity at night and he stood somewhere near the door. Light was supplied by an electric torch or torches carried by the dacoits and they naturally did not throw the light on each other. Yet out of 28 persons sent to identify this man was no less than 15 identified him. Some of these were persons in the house, some villagers who threw brick-bats from behind a cart in the road. The learned Public Prosecutor has been at pains to show that Narain was kept in parda while he was in police custody and that there was no reason

1930

KING-EMPEROR v. NARAIN.

to suspect any malpractice in the conduct of this identification. It may be so, but we cannot help noting that Narain came under suspicion of the Sub-Inspector, who was investigating the case five days before he was arrested and we also cannot help noting that he had a mark under one eye which all the witnesses were able to see. We also note that six of the eight identifying witnesses, who were actually examined in court, were most reckless in making false identifications when other accused persons were put up before them. We do not therefore consider that the learned Sessions Judge committed any error of judgement when he declined to accept this evidence of identification. We are left with the conclusion that the confession made by Narain is of little value, that the property which he produced does not belong to this dacoity, that the sword which may or may not be stolen property was recovered from a place where it could easily have been planted and that the identification in jail is open to grave suspicion. If on these grounds the learned Sessions Judge agreeing with his four assessors thought fit to pass an order of acquittal, we are certainly not disposed to interfere in appeal. We accordingly dismiss this appeal, confirm the order of acquittal passed by the lower court and direct that the accused, who has been arrested, shall be set at liberty forthwith.

Raza and Pullan, JJ.

Appeal dismissed.