

1922.

GOBIND RAM
v.
GANESH RAM.
BUCKNILL, J.

why there should not be another appeal against the status or personality of any individual who is actually appointed *the* Receiver in a case. For these reasons I think it would be wise here to regard the decision of the Madras Full Bench (in which, I may add, most of the other cases, which I have quoted above and which is also of quite a recent date) as at present a better authority than that as laid down in the earlier cases to which I have referred.

[The remainder of the judgment is not material to this report.]

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Coutts and Adami, J.J.

1922.

NIRU BHAGAT

v.

May, 9.

KING-EMPEROR.*

Examination of Accused—nature of—cross examination not permissible—statement elicited by improper question not to be used against accused—Confession—no weight to be attached to, when not reported until late stage of investigation—Leading question—answer to, not to be recorded or used.

The examination of an accused person by the Committing Magistrate should not be in the nature of cross examination.

Reliance should not be placed on a confession alleged to have been made by the accused shortly after he had committed murder but not reported to the police or to any one else until nearly a fortnight after it was said to have been made.

Where a witness, in answer to a leading question put by the Public Prosecutor, stated that the accused had confessed his guilt to him, *held*, that the question and answer should not have been recorded nor used against the accused.

* Death Reference No. 10 of 1922, and Criminal Appeal No. 65 of 1922, from the order of H. Foster, Esq., Judicial Commissioner of Chota Nagpur, dated the 12th April, 1922.

The facts of the case material to this report are stated in the judgment of Coutts, J.

S. A. Sami, for the appellant.

Sultan Ahmed, Government Advocate, for the Crown.

1922.

NIRU BHAGAT
v.
KING-
EMPEROR.

COUTTS, J.—The appellant in this case, Niru Bhagat, has been convicted by the Judicial Commissioner of Chota Nagpur of the murder of his mistress named Mussammat Lalo, on the 1st of January of this year and he has been sentenced to undergo the extreme penalty of the law.

The case for the prosecution is that about six months before the date of the occurrence, Mussammat Lalo deserted her husband and went to live with the appellant. The appellant was a follower of Kabir one of whose tenets was abstention from the eating of meat. Lalo refused to adopt the rules of Kabir and the result was that quarrels arose between her and Niru. On the Thursday before the death of Lalo there was a particularly bitter quarrel and Niru turned her and her things out of his house. She, however, put her things back into the house and refused to go and we next hear of the two having supper together amicably on the evening of Sunday the 1st of January. What happened afterwards at the house we do not know, but according to the prosecution during the night sometime towards morning, Niru went to the house of a fellow-villager, Gansu Rautia, woke him up and told him that as he was going to Barwe, he was returning him an axe which he had borrowed from him before. He actually left two axes with Gansu and went off. Barwe, I may mention, is a *pargana*, the boundary of which is a short distance from Niru's village. Before going away Niru told Gansu that he had killed Lalo. Niru then went to another co-villager, Chhedan Rautia, woke him up and demanded from him Rs. 9 which he had left with him to be kept in safe custody, and having got his money he told Chhedan that he had killed Lalo and then went away. Neither Gansu nor Chhedan did

1922.

NIRU BHAGAT

KING-
EMPEROR.

COURTS, J.

anything that night; but in the morning Lalo's father, who had been living with Niru and who had been away on a visit returned. He found the *angan* untidy and the door chained; he undid the chain and on opening the door he found Lalo's dead body lying on the ground. Meanwhile Chhedan had for some unexplained reason gone to Gansu and told him that Niru had killed Lalo, whereupon Gansu went and fetched the *chaukidar* of the village named Thirpa. Thirpa on arriving at the house unhooked the chain which Lalo's father had apparently re-fastened and after he had seen the dead body of Lalo, he with Gansu and another villager, Gurlu Rautia, went to Raidih Thana and laid the first information. Raidih Thana is only ten miles from Niru's village; but the first information was not recorded till 6 o'clock in the evening, and it was until the next day at about 2 *p.m.* that the Writer Head-Constable, who had recorded the first information, went to the spot. I may note here that after the Sub-Inspector of Raidih began to record the first information, he was seized with a fit and became "senseless", so the recording was continued by the Writer Head-Constable, and this accounts for it being the Writer Head-Constable who first went to the place of occurrence. On arrival at the place he began the investigation and sent the body of Lalo for *post-mortem* examination. On the following day (the 4th) he handed over the investigation to the Sub-Inspector of Chainpur, who later, on the 13th, handed it over to the Sub-Inspector of Raidih.

On the morning of the 2nd when Lalo's father, Shibtahal Rautia, went to the house and when the *chaukidar* was taken there Niru was not at home, and for this reason apparently it was stated in the first information that he was suspected of having committed the murder. There was no trace of Niru until the 4th when a Sub-Inspector of Police who had been at Gumla to give evidence and was returning to his own Police-station, saw a man at Lohardagga Railway Station behaving in what he considered to be a suspicious

1922.

NIRU BHAGAT

KING-
EMPEROR.

COUTTS, J

manner, and when the man got into the train he followed him into the same carriage and got into conversation with him. On account of what he told him he arrested him and took him to the Subdivisional Officer's office in Ranchi. The accused has in the Session Court denied all knowledge of the occurrence. In the Committing Magistrate's Court he was subjected to an examination which was really a cross-examination and in the course of it he stated that he had seen Lalo being killed by her husband, Budhu Rautia. Some reliance appears to have been placed on portions of this statement not only by the Committing Magistrate but also by the Sessions Judge: It is clear, however, that the statement must be left out of consideration in this case, for it is not an examination of the accused such as is contemplated by the Code of Criminal Procedure. What we have then is a denial of all knowledge of the occurrence by the accused who also says that he was away from home at the time.

The result of the *post-mortem* examination shows that Lalo had five very severe wounds on her head each of which had cut through the skull into the brain. The medical evidence shows that death was due to shock and hæmorrhage caused by these injuries. The injuries were probably caused by an axe, and it is clear from this evidence that the woman Lalo was killed by some one who had made a brutal attack on her.

The question is whether it was the appellant who inflicted the injuries. The evidence against the appellant is (1) that he quarrelled with the woman after she went to live with him because she would not accept his mode of living; (2) that he was seen with her after supper on the evening before her dead body was found; (3) that he made confessions to Gansu and Chhedan; and (4) that he was seen at Lohardagga by the Sub-Inspector and was arrested by him in the train.

The most important evidence against the appellant is his alleged confessions to Gansu and Chhedan, the

1922.

NIRU BHAGAT
v.
KING-
EMPEROR.
COURTS, J.

former of which is said to have been overheard by Gansu's wife, Budhani (P. W. 3). As this is the most important evidence, it is necessary to examine it carefully, but I may say at the outset that the learned Government Advocate has admitted that it is open to very grave criticism. Gansu's statement is that Niru woke him up in the night. He said he was going to Barwe and handed over two axes one of which he had previously borrowed from Gansu. There his evidence stopped, but a leading question was put to him by the prosecution :

"Did he say anything about Musst. Lalo?"

to which the reply is :

"Yes, he said he had killed her."

I need hardly say that it was most improper of the prosecution to put a leading question of this kind and it is surprising that the learned Judicial Commissioner should have allowed it or that he should have recorded and used the reply. It is impossible to attach any value to evidence elicited by the prosecution in this way. Apart from this, however, I fail to see how it would be possible to rely on this evidence. In the first place, the story is an improbable one. That a man who had just committed a brutal murder and was escaping should go to a neighbour merely to return a borrowed axe and thus to create evidence against himself is a story it would be very difficult to believe. It becomes still more incredible when we find that it was never told to any one until the 12th or 13th when it was told to the Sub-Inspector of Raidih. The improbability of this story and the fact that it was not told until nearly a fortnight after the occurrence is sufficient to damn it, but in addition to this there are certain discrepancies between the evidence of Gansu and Budhani his wife, which of themselves would go far to discredit the evidence. Gansu says that Niru did not speak loudly and that he could not distinctly hear whether he said he had killed his wife or what he said. Budhani, on the other hand, says that he spoke loudly when he said

he killed his wife. Again Gansu says that Niru gave him the axes, whereas his wife says that Niru had fled before her husband got into the verandah. It is unnecessary to go further into these discrepancies. It is impossible in my opinion to credit this story and the story of the axes would appear to have been introduced for the purpose of getting some material exhibit in the case.

The evidence of the witness Chhedan is of very much the same character, except that he is the only person who tells the story and consequently there can be no corroboration or discrepancies. His story is that Niru woke him up to get Rs. 9 which he was keeping in safe custody. Here again we have the inherent improbability of the story of a man having just committed a brutal murder creating evidence against himself and the fact that Chhedan did not tell the story of this so-called confession until nearly a fortnight after the occurrence. It is an improbable story which is uncorroborated, and under the circumstances I am unable to accept it.

The evidence of the so-called confession then goes and without this there is really nothing even if we accept the rest of the evidence to connect the accused with the murder except the quarrel, and the fact that Niru was the last person seen with the deceased before her death. The last quarrel, however, took place three days before the day of the occurrence and the evidence is that the appellant and the deceased when last seen were apparently sitting amicably together, so that the motive for the crime, so far as the accused is concerned, has disappeared. As a matter of fact, however, it is difficult to say whether the evidence of the quarrel and of eating supper together can be believed or not. The examination in chief and the cross-examination of all the witnesses indicate that both the prosecution and the defence have been conducted in a most perfunctory manner, and the learned Judicial Commissioner does not appear to have exerted himself to get at the real truth of the case: Not only does this

1922.

NIRU BHAGAT
v.
KING-
EMPEROR.
COURTS, J.

1922.
NIRU BHAGAT
v.
KING-
EMPEROR.
COURTS, J.

appear from a perusal of the evidence itself but it is also apparent from the fact that material witnesses have not been examined and no explanation is offered for their non-examination. With the exception of the Writer Head-Constable no investigating officer has been examined though apparently there were other two such officers. We, therefore, do not know when the witnesses Nos. 5 and 6 who deposed to the quarrel and the eating together of the supper, were examined by the police. It was important to know this and the non-production of such material witnesses as the investigation officers, is a serious omission which cannot but throw suspicion on the whole prosecution case.

Other points, which no attempt has been made to explain, are the delay in laying the first information and the delay in the Writer Head-Constable going to the spot after the first information was laid. In this connection also I may mention that Shibtahal Rautia in his evidence has referred several times to his wife and his evidence as it stands shows that he was expecting to find her at the house when he returned on the morning after the occurrence. I am not certain that the word "wife" has not been wrongly recorded by the learned Judicial Commissioner for the word "daughter" and I think that this is probably what has occurred; but it is a matter which should have been cleared up, and if there is no mistake in recording the evidence Shibtahal's wife was the most important witness in the case.

It is hardly necessary to refer to the evidence regarding the arrest of the appellant in the train, because as the learned Government Advocate has said it does not really affect the case. Niru's travelling by train from Lohardagga is quite as consistent with his story told to the Judicial Commissioner that he was away from home at the time of the occurrence as with his guilt.

In the result then in my opinion no case has been established against the appellant. I would accordingly

set aside the conviction and sentence and acquit the appellant.

1922.

ADAMI, J.—I agree with the decision arrived at by my learned Brother. There is only circumstantial evidence to connect the accused with the crime, and in cases of this nature, especially in case of a charge of murder, it is most necessary that every link of the chain of evidence should be carefully tested; no link should be missing and every link should be fully proved. In the present case there are links which will not stand the test. In my opinion the test applied by the prosecution and the court was not sufficient. The examination of the witnesses has been somewhat perfunctory, and insufficient attempt has been made to verify the details of the case which was one in which caution was most necessary.

NIRU BHAGAT
v.
KING-
EMPEROR.
COUTTS, J.

I am of opinion that the appellant should be acquitted.

Conviction set aside.

REVISIONAL CIVIL.

Before Coutts and Das, J.J.

SHEIKH NAZIR HUSSAIN

v.

MUHAMMAD EJAZ HUSSAIN.*

1922.

May, 10.

Execution of Decree—objection by judgment-debtor that property is waqf property, nature of—Appeal whether lies from order upholding objection—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 58 and sections 47 and 151.

An objection by the judgment-debtor to the execution of a decree against certain property on the ground that such property is *waqf* property, falls within Order XXI, rule 58, of the Code of Civil Procedure, and, therefore, no appeal lies from an

* Civil Revision No. 20 of 1922.