In my opinion this is not a tenable argument. A reference to the definition of "complaint" in the Code is a sufficient answer. And these proceedings were initiated by the sub-inspector of police who made the complaint and on that complaint the magistrate passed an order to summon the appellant. It is, in my opinion, impossible to construe that order passed on a complaint as being itself a complaint within the meaning of the Code. It follows, therefore, on the decisions above referred to that the proceedings in which the appellant has been convicted were wholly without jurisdiction because the bar imposed by section 195 has never been removed.

The conviction, therefore, cannot stand and must be set aside.

BUCKNILL, J.—I agree.

Conviction set aside.

S. A. K.

APPELLATE CRIMINAL.

Before Bucknill and Ross, J.J.

GOLAM MOHAMMAD KHAN

v.

KING-EMPEROR.*

1924.

Nov., 25.
Dec., 22.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 164—*Exculpatory statement by accused, whether admissible against him.*

Where an accused person makes a statement before a magistrate under section 164, Criminal Procedure Code, 1898, and the statement is not a confession but is of an exculpatory character, it is still admissible in evidence against the accused at his trial as evidential of a fact relative to the prosecution case.

* Criminal Appeal no. 170 of 1924 from the decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 6th July, 1924.

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Legal Remembrancer v. *Lalit Mohan Singh Roy* (1), *Queen-Empress* v. *Bhairab Chandra Chakravarty* (2) and *Queen-Empress* v. *Jagrup* (3), referred to.

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

Hasan Jan, for the appellant.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

Cur. adv. vult.

Dec., 22.

BUCKNILL, J.—This was an appeal made by a man named Golam Mohammad. He was tried by the Judicial Commissioner of Chota Nagpur together with another man, upon a charge of having committed dacoity, an offence punishable under the provisions of section 396 of the Indian Penal Code (dacoity with murder). The appellant and the other man were both found guilty and sentenced to transportation for life. The Judicial Commissioner, who presided at the trial, was assisted by four assessors, all of whom considered that the appellant was guilty.

Now there is, in this appeal, only one short, but by no means simple, point. It is unnecessary to set out the facts in this case at any length as they are not needed for the purposes of explaining the single argument which has been addressed to us by the learned Vakil who appears for the appellant. It is sufficient to say that on the night of the 21st March last there was a dacoity at the house of one Chethu Ahir; Chethu was terribly beaten and was killed: his skull was smashed and he had many other injuries.

Now the appellant only purported to be recognized by one witness for the prosecution. This person was one Palu who was the son of the deceased man. Palu, who was himself very roughly handled—he was stabbed

(1) (1922) I. L. R. 49 Cal. 169. (2) (1897-98) 2 Cal. W. N. 702.
(3) (1885) I. L. R. 7 All. 646.

in the buttock and covered with bruises—and although the dacoits were closely muffled up in *galmochas*, claims to have recognized some of the dacoits; at any rate he picked out the appellant at an identification parade: he did not know his name.

This was the only direct evidence given by the prosecution against the appellant: and had the matter rested there I think it is certain, or, at any rate, very probable, that the Judicial Commissioner would have hesitated to convict him. It is often and wisely, not thought safe to convict a person upon his identification by *one* individual under circumstances of strain and terror accompanying violent crime. But—and this is the crux of the present case—the appellant, after he had been apprehended and whilst the police enquiry was in progress, went before a Magistrate and made a statement which was recorded under the provisions of section 164 of the Criminal Procedure Code.

BUCKNILL, J.

The Magistrate, I imagine, thought he was going to receive a confession and in fact recorded it as such: and, I gather, thought it was in fact some form of confession. The Judicial Commissioner designates it as:

> "A statement of the nature of a confession".

There is no doubt, however, to my mind that it was not, in terms, a confession but it admitted the presence of the appellant at the occurrence. I need not set the appellant's statement out at length but its tenour is quite unequivocal. It is simply to the effect that a person called "Ganausi Khan" asked the appellant one afternoon to accompany him in order to try and help him find and catch one of his (Ganausi Khan's) labourers who had run away. The appellant acquiesced and went with Ganausi Khan to Ganausi Khan's house. They reached there about 7 P.M. At Ganausi Khan's house were some other men and after having had some food they and Ganausi Khan and the appellant went off in search of the absconding labourer.

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Some more men were picked up and eventually they came to the village where the dacoity took place. When close to the village Ganausi Khan *for the first time* disclosed to the appellant that the objective of the party was really dacoity. The appellant refused to participate in it but Ganausi Khan threatened to kill the appellant if he tried to run away. He was thus forced to remain a fearful spectator of what took place: he took no part in the affair but watched under duress: he saw the whole terrible business and the unfortunate Chethu murdered: the appellant was ten or fifteen paces away. He emphasized his own innocence. I think it is obvious that the story of duress makes his statement one in the main essentials of exculpatory character.

The Judicial Commissioner has admitted this statement in evidence and has used it against the appellant as corroborative of Palu's identification of the appellant. Palu says the appellant actually slapped him.

At the trial the appellant retracted his statement and said that he was tutored by the police to make it; but I see no reason to think that that was the case: nor did the Judicial Commissioner. The Magistrate who took the statement was examined. The admission of this statement was objected to. The Judicial Commissioner was not very clear *how* he admitted the statement: he seems to have thought it was a sort of confession and therefore admissible: if it was a confession it certainly *would* have been admissible. It certainly *is* admissible if it is of a confessional character. Its value, of course, is, as against the appellant, to show that he was in the company of the dacoits at the occurrence. The Judicial Commissioner adds that if it is not admissible under section 164 (I presume he means as a sort of confession) "the statement could be proved and admitted under the ordinary law just like any other fact." I am not quite sure what the learned Judicial Commissioner here means; but I suppose that he contemplates that

what an accused person says to a Magistrate would be admissible if the Magistrate gives evidence of the statement. Although we have had little definite authority placed before us in this case, it would seem doubtful whether, if this is what the learned Judicial Commissioner intended to convey, his view is altogether correct. In the case of *Legal Rembrancer* v. *Lalit Mohan Singh Roy* (1) it would seem to have been decided somewhat contrary to, at any rate, what may be a part of the learned Judicial Commissioner's view. In that case an accused person came before a Magistrate and made a statement. The Magistrate finding that the statement was not a confession, did not, apparently, take it down in writing or, if he did so, destroyed it. However he was called as a witness at the trial and gave evidence as to what the accused person had said to him. The Calcutta High Court held that this oral evidence was not admissible; that section 164 of the Criminal Procedure Code contemplated not only the taking of statements in the nature of a confession but also any kind of statements whether made by an accused person or by anybody else; that it was not competent for a Magistrate who was asked to take a statement under the provisions of section 164 to give oral evidence of any such statement made to him by an accused person (or apparently by anybody else) if he had not in fact complied with the provisions of the section by taking down the statement in writing and in the prescribed form. The decision in that case does not really deal directly with the question of the admissibility at a trial of statements made to a Magistrate in accordance with the provisions of section 164 by an accused person or by anybody else; although, inferentially, one might perhaps gather that their Lordships contemplated that such statements, of whatever nature they might be, would be admissible: though this inference is doubtful. However, it is, now, at any rate, strenuously argued before us by the learned vakil who appeared for the appellant, that this statement which was made

(1) (1922) I. L. R. 49 Cal. 169.

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by the appellant to the Magistrate under the provisions of section 164 should not have been admitted by the trial Court and used as against the appellant to corroborate the evidence of the witness who says that he identified the appellant at the time of the dacoity. Of course, if one examines section 164 it will be seen at once that the section contemplates more than one kind of statement; it distinctly refers to confessions and portions of the section deal specifically with confessions. But it also contemplates other statements. At one time it would seem to have been the view of the Calcutta High Court that section 164 only contemplated the *confessions* of an accused person and the statements made by persons who were or who were designed to be witnesses [vide *Queen-Empress* v. *Bhairab Chandra Chakravarty* (1)]; but from this view express dissent was taken in the case quoted above [*Legal Remembrancer* v. *Lalit Mohan Singh Roy* (2)].

It will be observed that section 164 does not say what statements or confessions made under its provisions are admissible in evidence at a trial. I take it that what statements or confessions made under section 164 are admissible at a trial must depend upon the law of evidence itself. It would, I think, be a mistake to suggest that *any* statement of confession made under section 164 is, simply because it may have been made under the provisions of that section, admissible at a trial for any or every purpose. As for confessions by an accused person there is ample provision for their admissibility at a trial for certain purposes: his confession is as capable of course of being used against an accused. But what is to be considered here is a different proposition. If an accused person makes a statement before a Magistrate which is not in fact a confession but is wholly of an exculpatory character, can that statement made by him before the Magistrate under the provisions of section 164 be admitted at his trial as evidence *in his*

(1) (1897-98) 2 Cal. W. N. 702. (2) (1922) I. L. R. 49 Cal. 169.

favour. We have had no clear authority quoted to us on this point. In this country, however, it seems to me that the law contemplates that an accused person can open his mouth to produce matter which can be used at his trial only in a few ways; one is a confession properly recorded; another is when he is examined and makes his statement orally or files a written statement after the close of the case for the prosecution; and his last, if the circumstance occur before the final trial Judge. If he goes before the Magistrate and under the provisions of section 164 makes a statement to him which is of an absolutely exculpatory character I do not think that that statement could be used at his trial as evidence *in his favour*; for, if this course was adopted, it would mean that the accused is competent to give evidence on his own behalf. He has the opportunity of saying at his commitment and at his trial what he wishes to say. It is true that such statements have been utilized by Judges on the evidence of Magistrates who took the statement that the accused had, at perhaps an early stage, given his explanation of what had taken place. But, although I have certainly seen exculpatory statements thus used, I am not sure whether such can properly be used for such a purpose: and I doubt it very much. Now if a statement of this kind could not be used even in the appellant's favour, could it then be used against him in any way? It must be borne in mind that the statement here is not a confession but of an exculpatory character and does not intrinsically contain anything definitely evidential or inferential of guilt. At the utmost it is an admission that he was present, unwillingly, at the scene of the occurrence. In the case of *Queen-Empress* v. *Jagrup* (1) it was held by Straight, J., that a statement made by a person to the effect that he had witnessed and protested against the perpetration of a crime of which he was accused was not a confession but was admissible in evidence against him. In that case the statement

(1) (1885) I. L. R. 7 All. 646.

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was apparently made not under section 164 but whilst he was in the custody of the police; and, although it is not quite clear, apparently *to* the police. The report of the case is not a very lucid one but it would seem that the learned Judge was considering the point which was argued before him that the statement was a confession made to the police whilst the accused was in custody and that therefore it was inadmissible. The learned Judge, however, held that it was not a confession and therefore presumably considered that it was admissible. If the learned Judge was right in this view it would certainly seem that a statement made before a Magistrate under the provisions of section 164 by a person in custody who is an accused person (such statement not being a confession but merely an admission of a relevant fact from which intrinsically no inference of guilt against the accused could be drawn) can *a fortiori* be utilized by the prosecution in evidence to prove that relevant fact; and, if that relevant fact can be coupled up with other evidence for the prosecution, it can be used as against the accused person who made the statement. Although I have not been able to ascertain that Straight, J.'s decision has been regularly followed I can see no reason whatever why a statement such as has been made in this case now before us could not be given in evidence by the prosecution and utilized as against the accused as evidential of a fact relative to the prosecution story: namely, that the accused who made the statement was in fact at the scene of the dacoity and actually saw it take place. I have therefore, after careful consideration, come to the conclusion that the accused's statement in this case *is* admissible. The only remaining question is, assuming that this statement may be taken in evidence, of what value it really is to the prosecution as being indicative of the guilt of the appellant. In itself and by itself it is not indicative in any way of his guilt; it simply proves that he was present at and saw what took place; he himself admits this. But can it be said that his admission that he was there so corroborates his identification by the witness Palu that

it must be taken that what this single witness states with regard to the active participation by the accused in the dacoity can be sufficiently relied upon in such measure as to justify the appellant's conviction? The witness does not suggest that the appellant had done more than slap him; what he says is:

"Both these accused (identifies them) were amongst the dacoits: I do not know their names. One pressed on my neck and others slapped me. That bearded one (the appellant here) slapped me."

One must not forget that whilst it is quite possible that the witness may have seen the appellant hanging about (as he himself says he was) on the outskirts of the gang, the attribution to him of any certain specific act is a very easy matter to allege and very difficult to refute; in a time of terror and confusion, when he had been stabbed on the back with a spear and beaten, one can well understand that a witness might be greatly inclined to attribute some overt act to any individual whom he thought he recognized as being in the company of the gang of robbers. I have, however, some hesitation in coming to the conclusion that the appellant's admission that he was, although under duress, at the occurrence, can be regarded as sufficiently corroborative of the single witness's statement that he (the appellant) took any overt part in the proceeding, to justify his conviction. On the other hand I am far from saying that, in certain circumstances, such an admission by an accused person might not be sufficient, when coupled with other evidence, to secure his conviction. In this case, the evidence of identification of the appellant admittedly rests primarly upon the evidence of the single witness Palu; the evidence that the appellant took any active part is not very convincing nor to my mind very effective. If Palu's evidence had been, for example, that the appellant had been engaged in struggling with him or had been in such a special position with regard to him that he had particular good opportunities for observing his physiognomy, the case against the appellant would undoubtedly have been somewhat stronger; as it is, the evidence given by the witness that the appellant

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committed an overt act is not of such a specific character but only of, what I may call, a somewhat though not altogether generalized nature.

Taking everything into consideration, I am of opinion that, although the case is one of great suspicion against the appellant, I hardly think that the evidence is sufficient to justify his conviction. His appeal must therefore be allowed and the appellant must be set at liberty.

Ross, J.—I agree.

Appeal allowed.

FULL BENCH.

Before Dawson Miller, C.J., Mullick, Jwala Prasad, Das and Foster, J.J.

1924.

Nov., 18.
Dec., 23.

KRISHNA MOHAN SINHA

v.

RAGHUNANDAN PANDEY.*

Court-Fees—Appeal to High Court—Taxing-Officer, power of, to decide question of valuation—Finality of taxing-officer's decision—Court-Fees Act, 1870 *(Act VII of* 1870*), section* 5.

Per *Dawson Miller, C.J., and Mullick and Jwala Prasad, J.J* :—In ascertaining the fee payable on a memorandum of appeal presented to the High Court on appeal from a subordinate Court the question of valuation can be taken into account by the Taxing-Officer; the Taxing-Officer is not bound by the valuation appearing on the memorandum of appeal whether such valuation has been accepted in the lower Court either without question or after contest.

Per *Das, J.*—The Taxing-Officer has no jurisdiction to decide a question relating to valuation for the purpose of determining the amount of court-fee payable by the appellant either on his plaint or on his memorandum of appeal, and, if he assumes jurisdiction to decide such a question the Court may ignore it.

*Second Appeal.