

## APPELLATE CRIMINAL.

Before Currie and Abdul Rashid JJ.

HASHMAT KHAN (CONVICT) Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 1343 of 1933.

*Indian Evidence Act, I of 1872, sections 24, 27: Confession—Inducement offered by person in authority—mere possibility of inducement—whether sufficient to render confession inadmissible—Suggestion that it would be well for accused if he confessed—whether inducement—Confession—irrelevant under section 24—how far admissible under section 27.*

The Sessions Judge found as regards the question whether the confession made by the accused to one *Malik Khaki Jan*, a *Zaildar* and Honorary Magistrate, was the result of inducement offered by *Malik Khaki Jan*—"that the bare possibility cannot be excluded that some inducement was held out to the accused. I do not say that I believe that as a matter of fact any inducement was offered, but the mere possibility of there having been some inducement is sufficient to render the confession inadmissible under section 24 of the Indian Evidence Act."

*Held*, that it is only when it appears to the Court that the confession has been made as a result of some inducement held out by a person in authority that it becomes irrelevant, a mere possibility of there having been some inducement is not sufficient (*vide* section 24, Indian Evidence Act).

*Held, however*, that the vernacular words "*achha hoga agar sach bataoge*," used by *Malik Khaki Jan* when questioning the accused, are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that they amounted to an inducement within the meaning of section 24 of the Indian Evidence Act and the accused's confession must therefore be held to be inadmissible.

Amir Ali and Woodroffe's Commentary on the Indian Evidence Act, 9th Edition, pp. 283, 284, referred to.

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*Held further*, that it is an erroneous view of the law to hold that section 27 of the Act can operate to make admissible in evidence a confession which would otherwise be irrelevant under section 24. Under section 27 only so much of the confession is admissible as relates distinctly to the facts thereby discovered.

*Appeal from the order of Mr. C. N. T. Henry, Sessions Judge, Attock, at Campbellpur, dated the 6th October, 1933, convicting the appellant.*

NAND LAL, for Appellant.

DES RAJ SAWHNEY, Public Prosecutor, for Respondent.

CURRIE J.—The appellant Hashmat Khan has been convicted for the murder of his father Abbas Khan and sentenced to death. He has appealed and his case is also before us under section 374, Criminal Procedure Code, for confirmation of the death sentence.

Abbas Khan was murdered on the night of the 1st/2nd April, 1933, in his house. The appellant himself made the First Information Report at Pind Sultani Police Station, some 15 or 16 miles away, at 6 P.M., stating that, on going into the house after milking the cow and goat, he had found his father lying murdered. He had informed the *Lambardar* Faja Khan and a relative, and, after seeing the corpse, they had directed him to go and report. He did not throw suspicion on anyone in the report. The Police proceeded to the village and it appears that suspicion fell at first on two other lots of people, *viz.* *Mussammatt* Nur Bhari, the wife of the deceased, and her father; and on two men, named Sher Jang and Ghulam Mohammad. Finally, on the evening

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of the 4th April, suspicion centred on the accused and he was questioned. Nothing, however, was elicited that day. The following day, the 5th of April, the Sub-Inspector went off to village Basal, accompanied by *Malik* Sadullah Khan, who was assisting in the enquiry. He left behind the Assistant Sub-Inspector Ujagar Singh and *Malik* Khaki Jan. The Assistant Sub-Inspector spent the day at the school making various enquiries and Hashmat Khan was made over to *Malik* Khaki Jan to question him further at his *dera* some 100 yards away from the school. Eventually, about 3 P.M., the accused is alleged to have confessed to *Malik* Khaki Jan. He sent for *Malik* Sadullah Khan, who had returned by that time from Basal, and the accused repeated his confession, undertaking to produce the hatchet with which the murder had been committed. The two *Maliks* then took the accused to the Assistant Sub-Inspector and told him that he had confessed. The party then went to the deceased's house where the accused produced a hatchet and a *chadar* which was buried in the ground. These articles are proved to have been stained with human blood by the report of the Imperial Serologist.

The accused before the Committing Magistrate denied that he had murdered his father or produced the blood-stained axe and *chadar* and stated that the case had been got up against him owing to the enmity of Ghulam Mohammad and Sher Jang. Before the Sessions Judge he stated that he could not have murdered his own father and that *Malik* Khaki Jan and the Sub-Inspector had taken a bribe of Rs. 2,000 to shield Sher Jang and Ghulam Mohammad and had falsely accused him. He produced no defence.

The assessors unanimously held that the accused was guilty, one of them qualifying his opinion by adding, "If the confession is believed." The learned Sessions Judge relying on the confession has convicted the appellant.

Before turning to the discussion of this confession, it will be convenient to deal with the other evidence against the appellant. The evidence clearly proves that the accused and his father had not been on good terms. His father had been married three times before he married his present wife *Mussammât Nur Bhari* (P. W. 2). When he married his present wife, some  $3\frac{1}{2}$  years back, the dower, according to her statement, was fixed at 160 *kanals* of land. Actually it appears from exhibit P. E., the mutation in her favour, that her husband transferred to her, in lieu of dower,  $\frac{1}{8}$ th share in his total holding of 596 *kanals*, 4 *marlas*, i.e. an area of 71 *kanals*, 3 *marlas*. As a result of this, relations between her husband and Hashmat Khan had become strained. A reconciliation had been effected through Faja Khan and the school master Ahmad Khan (P. W. 6) and Hashmat had returned to his father's house. According to Ahmad Khan, the reconciliation had taken place five or six days before the murder, while Faja Khan dated it at a month before the murder. On the night of the murder there is no doubt that *Mussammât Nur Bhari* was, as she says, at the house of her parents. It may here be noted that there is nothing on the record to suggest that she or her father had any hand in causing the death of Abbas Khan. The same remark applies to the suspicion thrown on Sher Jang and Ghulam Mohammad. Faja Khan (P. W. 5) states

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that they were not on good terms with the deceased but does not specify the cause of enmity. This in itself affords no reasonable ground for suspecting them or holding that they procured evidence to bolster up a false case against the present appellant.

The evidence of Faja Khan is to the effect that after sunrise, when he was in his field, Hashmat Khan came and said that he had something important to say. He replied that he was busy, so Hashmat Khan went away and a couple of hours later the witness returned to the village and asked Hashmat Khan what his important news was, whereon he said that his father was lying murdered: witness saw the corpse and directed Hashmat to go and report as a long time had passed. This is extraordinary behaviour on the part of the appellant, but there is no ground for doubting Faja Khan's evidence as, from the rest of his statement, it is clear that he is doing his best to save the appellant. In addition to this there is the evidence of Dullah, a *Mochi*, whose house is only divided from that of the appellant by a thorn hedge. He deposed to hearing a quarrel between father and son the previous night: his father asking him to clear out of the house and Hashmat then saying that since he had thrown him out he would see to him: Hashmat then went to sleep at Faja Khan's *baithak* where he usually slept. The next witness Sher (P. W. 4) says that he, too, was sleeping at that *baithak*: when he awoke at midnight to have a smoke he called out to Hashmat Khan but got no reply: he found that he was not in the *baithak*. After smoking he went to sleep again and shortly after Hashmat Khan returned. He said that he had been to his house for a stroll. About morning meal time the news that Abbas had

been murdered reached the witness. These two witnesses were not examined by the Police till after the alleged confession. That in itself is no ground for disbelieving their evidence. As the learned Sessions Judge points out, however, though this evidence may afford good ground for suspecting the appellant, it is in itself not sufficient to establish his guilt.

To turn now to the confession alleged to have been made by Hashmat Khan to *Malik* Khaki Jan and *Malik* Sadullah Khan on which the learned Sessions Judge has relied for the conviction of the appellant. This confession has been attacked by Dr. Nand Lal, who argued the case for the appellant on several grounds. First, he contends that the appellant made no confession whatever and that the two *Maliks* are perjuring themselves in saying that he did. In the second place, he urges that the confession is inadmissible as having been made in the presence of the Police, or, if not in their actual presence, that the Police were so close that it was tantamount to their being present. Thirdly, that it was inadmissible as having been made in consequence of inducement offered by persons in authority.

As regards the first contention, I can see no ground whatever for accepting it. There is no apparent reason for *Malik* Khaki Jan and *Malik* Sadullah Khan, neither of whom belong to the appellant's village, to falsely implicate him. The other two contentions must be discussed at some length. As regards the suggestion that the Police were present when the confession was made to *Malik* Khaki Jan, this is based on the statement of Faja Khan (P. W. 5), who states that he, *Malik* Sadullah Khan and

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*Malik* Khaki Jan kept conversing with Hashmat Khan in the presence of the Police. Hashmat Khan at the time was under surveillance but not under arrest. The Sub-Inspector, according to Faja Khan, was actually present when Hashmat Khan confessed. If, by the Sub-Inspector, the witness means the Sub-Inspector *Chaudhri* Qamar-ud-Din, there is not the least doubt that that officer was not present but had gone to investigate another murder at Basal with *Malik* Sadullah Khan. There is not the least reason for disbelieving the Assistant Sub-Inspector and *Malik* Khaki Jan who state that, while the *Malik* was questioning Hashmat Khan, the Assistant Sub-Inspector was carrying out other enquiries at the school, a hundred yards away. Dr. Nand Lal contends that, in such circumstances, it must be held that the appellant confessed in the presence of the Police. In this connection he cited two rulings *Kutab Ali v. Crown* (1) and *Bulaqi v. The Crown* (2). In the former ruling it was held that a confession made to a *Zaildar* in the presence of the Police and after arrival of the *Thamedar*, who at the time of the confession was sitting only a few yards off, was in reality a confession made to the Police within the meaning of section 25 of the Indian Evidence Act and consequently inadmissible in evidence. In the latter ruling the confession was held to be irrelevant under section 24 of the Indian Evidence Act, the learned Judge remarking: "It appears to me from the circumstances that it (the confession) was caused by Bakra holding out an inducement as from the Sub-Inspector whose man he undoubtedly was." The learned Public Prosecutor in dealing with this aspect

(1) 14 P. R. (Cr.) 1911. (2) (1928) I. L. R. 9 Lah. 671.

of the confession has referred to the Full Bench decision of this Court reported in *Abdulla v. Crown* (1), and urges that, even if the Police were held to have been present when the confession was made, yet it is admissible as having been made to a Magistrate and thus coming within the scope of section 26 of the Indian Evidence Act. It was elicited from *Malik Khaki Jan* in cross-examination that he was an Honorary Magistrate. There is not the least ground for disbelieving this statement, though Dr. Nand Lal contends that it has not been proved that he is an Honorary Magistrate. It is further urged that as a matter of fact *Malik Khaki Jan* is a *Zaildar* and therefore a village Magistrate and as such a confession made to him would not come within the scope of section 26 of the Indian Evidence Act by virtue of the explanation attached to that section. In this province, however, Honorary Magistrates exercise their powers under the Code of Criminal Procedure, and the contention, therefore, has no force.

Dr. Nand Lal further contends that the ruling referred to is inapplicable in the present case as *Malik Khaki Jan* was not "associated with the Police in the investigation," and had not proclaimed the fact that he was a Magistrate. There is nothing, however, that I can see in the ruling to limit it in any such way, and in my opinion, even if it were held that a confession made in these circumstances when the Sub-Inspector was a hundred yards away was made in the presence of the Police, the defect would be cured by the fact that *Malik Khaki Jan* was a Magistrate.

As regards the third point, the question has been rendered somewhat difficult by the manner in which

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it has been approached by the learned Sessions Judge. He has come to no clear finding as to whether the confession was the result of inducement offered by *Malik Khaki Jan*. He remarks: "I am of the opinion, after a careful reflection, that the bare possibility cannot be excluded that some inducement was held out to the accused. I do not say that I believe that as a matter of fact any inducement was offered; but the mere possibility of there having been some inducement is sufficient to render the confession inadmissible under section 24 of the Indian Evidence Act. And, if the confession stood alone, I am of the opinion that it would have to be disregarded as evidence in this case."

Had the learned Sessions Judge referred to the language of section 24 of the Indian Evidence Act he would have seen that "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession *appears to the Court* to have been caused by any inducement \* \* \* \*, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him". The section does not lay down, as the learned Sessions Judge considers, that if there is a bare possibility of an inducement having been offered that is sufficient ground for holding that the confession is irrelevant. It is only when it appears to the Court that the confession has been made as a result of some inducement held out by a person in authority that it becomes irrelevant. In the present case it would seem that

the learned Sessions Judge has misdirected himself in the view that he has taken. He has certainly not clearly found that it appears to him that the confession was a result of any inducement held out by *Malik Khaki Jan*. I shall revert later to the consideration of whether or no there is good ground for holding that any inducement was offered. The cursory treatment of this question of inducement by the learned Sessions Judge has arisen from the erroneous view which he has adopted as regards the effect of the recovery of a blood-stained hatchet and *chadar*. He apparently thinks that section 27 of the Indian Evidence Act can operate to make admissible in evidence a confession which would otherwise be irrelevant under section 24 of the Indian Evidence Act. He has based this opinion on certain remarks occurring in *Bulagi v. The Crown* (1). These remarks appear as the head note in the report of that case given in the All India Reporter (1), as cited by the learned Sessions Judge. In the head note of the authorized report, however, these words are qualified and the head-note runs: "The discovery of the dead body at the instance of the accused was admissible against him, because the broad ground for not admitting confession under inducement or to a Police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by section 27, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given." From this and the judgment itself it is clear that it was not the whole confession which was admitted but only so much thereof as related distinctly to the fact thereby

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(1) (1928) I. L. R. 9 Lah. 671: 1928 A. I. R. (Lah.) 476.

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discovered, that is to say, in that case the discovery of the dead body. In the present case all that would be admissible under section 27 of the Indian Evidence Act would be the recovery of the blood-stained axe and *chadar*.

To revert to the question of, whether the confession was made by the appellant owing to any inducement offered to him, *Malik Khaki Jan* states that all he told the accused was that it would be better if he told the truth. The words used in the vernacular are : "*achha hoga agar sach bataoge.*" They were alone at the time. The evidence of *Malik Sadullah Khan* throws no light on the point as he was away with the Sub-Inspector at Basal at the time the confession was made to *Malik Khaki Jan*. One prosecution witness *Faja Khan* (P. W. 5), definitely states that the preceding evening the Sub-Inspector tried to prevail on the accused to confess saying that he would be pardoned. The Sub-Inspector was never questioned as to whether he examined the accused at all before the confession was made to *Malik Khaki Jan*. The Assistant Sub-Inspector states that he made enquiries from the accused on the evening of the 4th : and the accused appeared before the Sub-Inspector at 8 A.M. on the 5th : and was made over to *Malik Khaki Jan* about 9 A.M. when the Sub-Inspector left. If the evidence of *Faja Khan* be accepted at its face value there would clearly be ground for holding that the confession was induced. Even if the Sub-Inspector or the Assistant Sub-Inspector did not go so far as actually to say that he would be pardoned there would appear to be some ground for thinking that some inducement was held out to the appellant by the Police before they handed him over to *Malik*

Khaki Jan. As regards the words used by *Malik* Khaki Jan. Amir Ali and Woodroffe in their commentary on the Indian Evidence Act, 9th edition, pp. 283, 284, remark: "There is, however, one form of inducement, namely, 'You had better tell the truth' and equivalent expressions which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise." It appears from the commentary that such words are only held not to be an inducement where they are qualified in some manner, such as by an appeal to the accused's religious sentiment. In the present case there is no such qualification and it cannot be said that the words as they stand are a mere exhortation to tell the truth. In view of the fact that the accused had already been questioned by the Police before he was handed over on the 5th to *Malik* Khaki Jan the words are susceptible of the interpretation that the accused was told that it would be better *for him* if he told the truth and that, in my opinion, amounts to an inducement. *Malik* Khaki Jan as *Zaildar* and an Honorary Magistrate must be held to be a person in authority within the meaning of section 24 of the Indian Evidence Act and the confession must, therefore, be held to be inadmissible under the provisions of that section.

We are left, therefore, with the production of the axe and *chadar*. Neither of these articles has been proved to be the property of the accused. According to the Assistant Sub-Inspector they were identified by *Mussammāt* Nur Bhari as belonging to Abbas Khan, the deceased. The word used in the recovery list is "*apna*." *Mussammāt* Nur Bhari,

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however, was never called upon in Court to identify them, and it cannot be said that there is anything to show that they belonged to the accused.

In the light of the decision reported in *Sukhan v. The Crown* (1), nothing more than the statement of the accused that he had buried this hatchet and *chadar* at that place is admissible. None of the witnesses state that at the time of the actual recovery of the axe the accused made any admission that this was the weapon used in the commission of the crime. Thus the fact that *Malik Khaki Jan* is a Magistrate is no ground for holding that something more of the confession is admissible.

Even, coupled with the evidence regarding the suspicious conduct of the appellant, the mere production of the blood-stained axe is not, in my opinion, apart from the confession, which I have held to be inadmissible, sufficient ground for maintaining his conviction.

I would, therefore, accept the appeal and acquit the appellant.

ABDUL RASHID J.—I agree.

A. N. C.

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*Appeal accepted.*