

[APPELLATE CRIMINAL.]

Before Mr. Justice Kemball and Mr. Justice Pinhey.

EMPRESS v. MALKÁ.

1878.
July 4.*Code of Criminal Procedure, (Act X. of 1872,) Section 122—Power of a Magistrate to record a statement of a person not accused of an offence.*

Section 122 of the Code of Criminal Procedure (Act X. of 1872) authorizes a Magistrate to record the statement of a person who appears before him as a witness, as well as the confession of a person accused of an offence.

THIS was a reference, under section 296 of the Code of Criminal Procedure, by J. Elphinstone, Magistrate of Dharwar, under the following circumstances :—

During the investigation, by the police, of a charge of murder against one Pirá bin Paramuá, a constable of police took the present accused Malká to the Second Class Magistrate, of Hángal, Ráv Sáheb Murár Vithal, who, under section 122 of the Code of Criminal Procedure, took down his statement. In this statement Malká mentioned that “Pirá with a stick, which was in his hand, struck the deceased a blow on the right side of his head.” The statement was made on solemn affirmation, and recorded with the object of preventing Malká from making a different statement before the committing Magistrate.

The preliminary inquiry into Pirá's case was held by Mr. C. P. B. Wiltshire, Magistrate, F.C., Dharwar. Before him Malká deposed, also, on solemn affirmation, that he knew nothing about the case, and was, in consequence, directed by him, as well as by the Magistrate of the District, to be prosecuted before Mr. J. C. Anding, Magistrate, F.C., in the same district, for giving false evidence in a judicial proceeding under section 193 of the Indian Penal Code.

When the case of Malká came up before Mr. Anding, he was of opinion that the procedure of the Second Class Magistrate of Hángal, in recording the statement of Malká, in the murder case against Pirá, under section 122 of the Code of Criminal Procedure, with a view to prevent him from altering his statement before Mr. Wiltshire, was illegal, and, consequently, that the statement itself was null and void. He considered that section 122 applied only

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to persons accused by the police or by other persons, and not to witnesses. Mr. Anding, accordingly, discharged Malká under section 215 of the Code of Criminal Procedure.

Thereupon Mr. J. Elphinstone, Magistrate of Dharwar, reported the proceedings for the orders of the High Court, as he felt a doubt as to the correctness of Mr. Anding's view. It appeared to him that the words "by any person," not being in any way qualified, included witnesses as well as persons accused of an offence.

KEMBALL, J. :—The Court concurs with the District Magistrate in thinking that Mr. Anding's view is wrong. It, therefore, annuls his order of discharge, and directs that the trial of Malká be proceeded with and disposed of according to law. Section 122 of the Code of Criminal Procedure clearly contemplates two distinct cases: one is that of a person coming forward to state what he knows; the other is that of a person accused by a police officer of an offence who comes forward to confess his guilt. With regard to the former, the section provides that the statement made by him shall be recorded in the manner prescribed for recording evidence—that is to say, under section 331 of the Code of Criminal Procedure, on oath or affirmation; whereas in the case of an accused person confessing to an offence of which he is accused, the Code, by section 345, enacts that neither oath nor affirmation shall be administered to him.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Bayley.

July 5.

LUCKMIDA'S VITHALDA'S (ORIGINAL PLAINTIFF), APPELLANT, v.
 EBRAHIM OOSMAN (ORIGINAL DEFENDANT), RESPONDENT.*

Ex-parte decree, right of appeal against—Code of Civil Procedure (Act X. of 1877), chap. XXXIX and sections 586-591—Summary procedure on negotiable instruments.

Held—An appeal lies from an order, made under section 534 of the Civil Procedure Code of 1877, refusing to set aside an *ex-parte* decree.

This was a summary suit brought by plaintiff upon a promissory note under the provisions of chapter XXXIX of the Civil Pro-

* Suit No. 340 of 1878.