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of the Evidence Act, and may be cross-examined upon it by the counsel against whose cause the testimony aided by it has been given; and, as ruled by this Court in *Reg.* v. *Uttamchand*(1), the person making the statement may properly be questioned about it; and, with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statement was made, can be examined on the point under section 155 of the Evidence Act. [After discussing the evidence in the case, the Court dismissed the appeal.]

(1) 11 Bom. H. C. Rep., 120.

APPELLATE CRIMINAL.

Before Mr. Justice West and Mr. Justice Birdwood.

QUEEN-EMPRESS *v.* ISMA'L VALAD FATARU.*

1887. *April* 5.

Sanction—Criminal Procedure Code (Act X of 1882*), Sec.* 195*—Police officer acting under Section* 161*—Prosecution for giving false evidence to a police officer—Statement taken down under Section* 161*—Evidence.*

A statement taken down in the course of a police investigation by a police constable under section 161 of the Criminal Procedure Code (Act X of 1882) is not evidence at any stage of a judicial proceeding.

A police constable taking down a statement under section 161 of the Criminal Procedure Code is not a judge, nor is the place where he officiates a Court. His sanction is, therefore, not necessary, under section 195 of the Criminal Procedure Code, to a prosecution for a false statement made to him, whether the charge be framed singly or alternatively.

THIS was an appeal by Government against the order of acquittal made by G. MacCorkell, Acting Sessions Judge of Khándesh.

During a police investigation the accused Ismál valad Fataru made certain statements to the chief constable, which he afterwards withdrew at the trial before the First Class Magistrate. He was, therefore, charged, in the alternative, with having given false evidence either before the police officer under section 161 of the Criminal Procedure Code (Act X of 1882), or subsequently before the trying Magistrate, when he denied and contradicted

* Criminal Appeal, No. 21 of 1887.

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his former statements. The trying Magistrate gave sanction to prosecute the accused.

The accused pleaded that he was drunk at the time he was examined by the chief constable, and, therefore, did not know what he stated before the police officer. This plea was not satisfactorily established. The accused was, therefore, convicted under section 193 of the Indian Penal Code, and sentenced to suffer rigorous imprisonment for two months, and to pay a fine of Rs. 10.

In appeal, the Acting Sessions Judge reversed the conviction and sentence, on the ground that there was no sanction from the chief constable for the present prosecution. He was of opinion that a police officer taking down a statement under section 161 of the Criminal Procedure Code was a judge for that purpose, and that, therefore, his sanction was necessary under section 195 of the Code.

Against this order of acquittal, Government appealed to the High Court.

Hon. Ráv Sáheb *V. N. Mandlik* for the Crown :—A police officer acting under section 161 of Act X of 1882 does not act in a judicial capacity. In the Full Bench case of *Queen-Empress* v. *Bharma*[1] it is held that a Magistrate taking down a statement under section 164, does not exercise the functions of a judge. *A fortiori* a police constable is not a judge, when taking down a statement under section 161. Section 195, therefore, does not apply.

WEST, J.:—The Sessions Judge, relying on the ruling in *Queen-Empress* v. *Parshrám Rysing*[2], has considered that a police officer taking down a statement under section 161 of the Code of Criminal Procedure is a Judge for that purpose. Hence he has considered the sanction "of the police", as of a Court, was necessary, to enable cognizance to be taken of an accusation, in the alternative, of having given false evidence either before the police officer under section 161, or subsequently before the Magistrate, First Class, when the deponent denied and contradicted his previous statement.

(1) See *post*.

(2) I. L. R., 8 Bom., 216.

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It has recently been ruled in *Queen-Empress* v. *Bharma*(1), that a statement taken down in the course of a police investigation by a Third Class Magistrate under section 164 of the Criminal Procedure Code, is not evidence in a stage of a judicial proceeding. Much less, then, is a statement taken by a police constable under section 161. Section 162 prescribes that no statement, thus taken, shall be signed by the person making it, and we recently held in *Queen-Empress* v. *Sitárám Vithal*(2) that the memorandum taken by the constable is not evidence, though he may use it to refresh his memory, and may be cross-examined upon it by the counsel against whose cause the testimony, aided by it, has been given. But while the memorandum is not evidence in the sense that it can be used as itself furnishing any proof either for or against an accused, apart from the oral testimony of the police officer entitled to refer to it in order to refresh his memory, section 191 of the Indian Penal Code defines as giving false evidence for the purposes of the Code, not only the making of a false statement in a judicial proceeding, but in every case wherein the deponent is bound by law to state the truth. Section 161 of the Criminal Procedure Code (Act X of 1882) binds a person questioned by the police to tell the truth, though his signature may not be taken to his statement; and if he fails to tell the truth, he renders himself liable to punishment under the latter clause of section 193 of the Indian Penal Code.

At the same time, the police officer is not, by these special provisions, made a judge, nor is the place where he officiates made a Court. Section 195 of the Code of Criminal Procedure (Act X of 1882), therefore, does not apply to a prosecution for a false statement made to a police officer, whether the charge imputing falsehood be framed singly or alternatively.

We must, consequently, reverse the judgment of acquittal passed by the Sessions Judge on the technical ground of absence of sanction by the police, and restore the sentence passed by the Magistrate, First Class, who tried the case.

Order of acquittal quashed.

(1) See *post*.

(2) See *ante*, p. 657.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1886. *March* 25.

PARBHUDA'S LAKHMIDA'S, PLAINTIFF, *v.* SHANKARBHA'I AND OTHERS, DEFENDANTS.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 265—*Execution—Decree for partition referred to Collector—Collector bound to partition and deliver over possession to several allottees under decree—Practice.*

The duty of the Collector, to whom a decree has been referred under Section 255 of the Civil Procedure Code (Act XIV of 1882) for partition, is not confined to mere division of the lands decreed to be divided, but includes the delivery of the shares to their respective allottees.

THIS was a reference by Ráv Sáheb Harilál Chhaganlál Satyavádi, Subordinate Judge of Nadiád, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff applied for execution of the decree obtained by him in Suit No. 74 of 1883, which directed the defendants to deliver possession of the southern half of the field then in dispute. The execution of the said decree was referred, under section 265 of the Code of Civil Procedure, to the Collector of Kaira, who, being of opinion that delivery of possession was not part of this duty, ordered measurement of the share decreed to the plaintiff only, and returned the proceedings without giving plaintiff possession of his share.

The question referred for decision was—whether the Collector, to whom an application for execution of a decree for partition or separate possession of a share of land paying revenue to Government had been referred under section 265 of the Code of Civil Procedure, was simply to make a division of land by measurement, or was also bound to deliver possession of the shares, as directed by the decree.

The Subordinate Judge of Nadiád was of opinion that delivery of possession in such cases was part of the Collector's functions.

There was no appearance for the parties.

* Civil Reference, No. 45 of 1885.

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PARBHUDÁS LAKHMIDÁS v. SHANKARBHÁI.

SARGENT, C. J.:—We think that the Collector should deliver possession of the shares after making the requisite division. Section 265 of the Civil Procedure Code (XIV of 1882) contemplates the "partition" being completely carried out by the Collector; and the circumstance that it does not provide for the Collector's reporting to the Court, as is the case with lands not paying revenue to Government by section 396, points to the conclusion that the term "partition" is not confined to mere division of the lands in question into the requisite parts, but includes the delivery of the shares to their respective allottees. This view is further confirmed by the language of the sections in Bombay Act V of 1879, which lay down the rules to be observed by the Collector in carrying out a partition. In clause 2, section 113, the Collector is directed to "make over" to one of the sharers any number which may remain after partition has been carried out as far as possible, and in section 114 the Collector is to "divide" the estate into shares according to the respective rights of the co-sharers, and to "allot" such shares to the co-sharers." Lastly, we have reason to believe that this is the general practice of Collectors.

APPELLATE CIVIL.

Before Mr. Justice Nánábhdi Haridás and Mr. Justice Jardine.

RAISINGJI, (ORIGINAL DEFENDANT), APPELLANT, *v.* BALVANTRA'O, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *March* 28.

Practice—Civil Procedure Code (Act XIV of 1882), *Sec.* 562—*Order of remand—Issues undecided—Procedure.*

A Subordinate Judge decided a suit on the grounds (1) that it was *res judicata*, (2) that it was barred by limitation. On appeal, the Assistant Judge upheld the decree on the first-mentioned ground without deciding the point of limitation. On second appeal, the High Court reversed the Assistant Judge's decision, holding that the suit was not *res judicata*, and remanded the case to be tried on the merits. On receipt of the order of the High Court, the Assistant Judge reversed the decree of the Subordinate Judge without giving any decision on the point of limitation, and remanded the case to the Subordinate Judge to be tried on the merits. From this order the defendant appealed to the High Court.

* Appeal, No. 1 of 1887.