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liberty to do is to construe the decree in the former suit, to ascertain its intention from the expressions contained in it, and to give effect to that intention when so ascertained. In construing the above decree we do not find in it any substantial difference to distinguish it from the decrees which the Court had to consider in *Narlu* v. *Rághu*(1) and *Tátya* v. *Bápu*(2). The omission from it of the word "said" before the words "sum due" does not appear to us to alter the sense of the decree. We consider that the decrees in those cases were correctly construed.

In the case of *Dattátraya* v. *A'náji (supra)* the decree simply awarded possession of the mortgaged property to the mortgagee, and differs in that respect from the decree with which this reference deals.

We answer the question submitted to us in the negative.

(1) I. L. R., 8 Bom., 303. (2) I. L. R., 7 Bom., 330.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS v. MONA PUNA.*

1892. February 4.

Evidence—Admissibility—Indian Evidence Act (I of 1872), Sec. 118—Evidence of a witness illegally pardoned by the police—Meaning of "accused" in Section 342 of the Code of Criminal Procedure (Act X of 1882).

During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom, named Hari, made certain disclosures to the police, and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted.

Held, that the evidence of Hari was admissible under section 118 of the Indian Evidence Act, though he had been illegally discharged by the police.

Held, also, that by the word "accused" in section 342 of the Code of Criminal Procedure (Act X of 1882) is meant a person over whom the Magistrate or other Court is exercising jurisdiction.

APPEAL from the conviction and sentence recorded by W. H. Hamilton, Presidency Magistrate, in the case of *Queen-Empress* v. *Mona Puna and others.*

The material facts of this case are as follows :—

The police received information that the house of Mrs. Britto, a resident of Dádar, had been broken into and property worth Rs. 410 stolen.

* Criminal Appeal, No. 317 of 1891.

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In the course of their investigation, the police arrested the accused Mona and several other persons, one of whom, named Hari, made certain disclosures, and pointed out several houses which had been broken into. The police thereupon released Hari and made him a witness.

At the trial of his accomplices on charges of house-breaking and theft, Hari deposed that they were all thieves, and concerned in the commission of the offence.

The Presidency Magistrate convicted all the accused, and sentenced them each to two years' rigorous imprisonment.

The accused Mona appealed to the High Court. The other accused also preferred separate appeals to the High Court.

There was no appearance for the accused.

Branson for the Crown:—We say Hari was not arrested. When the police tried to arrest his accomplices, Hari escaped. Hari no doubt says that he was arrested. But, even assuming that he was arrested, a person arrested by the police on suspicion is not an accused person. By the term accused person is meant one who is accused before a Magistrate. Hari was never placed before the Magistrate as an accused person. As soon as he was arrested he made certain disclosures to the police. Thereupon he was discharged and made a witness. Even if the discharge be illegal, he was a competent witness under section 118 of the Indian Evidence Act. Refers to *Reg.* v. *Hanmanta*(1); *Empress of India* v. *Ashghar Ali*(2); *Queen-Empress* v. *Dala*(3).

JARDINE, J.:—Mr. Justice Telang concurs in the following judgment. As we intimated at the hearing, we are of opinion that the conviction of Mona Puna for house-breaking and theft in Mrs. Britto's house cannot be upheld. It may be that he was an associate with the thieves, the other prisoners: he admits that he lived in the same room. The Bania Nagin, who disposed of the stolen property for the prisoners, says that Rupchand gave it to him, Mona and the rest being then present, but Mona took no part in the conversation. Another witness, Hari, whom we take

(1) I. L. R., 1 Bom., 610. (2) I. L. R., 2 All., 260.
(3) I. L. R., 10 Bom 190.

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to be an accomplice in crime, but who says he gave valuable information to the police and who was called for the prosecution, deposes that Mona stayed at home when the others went out and committed the theft. With such evidence on the record, it would be unsafe to infer the guilt of Mona merely because he lived in the same room with the others. The house-breaking and theft are fully accounted for by the evidence pointing to the others as the criminals. We, therefore, reverse the conviction and sentence passed on Mona Puna.

Mr. Hamilton, the Second Presidency Magistrate, noticed in his judgment that the witness Hari after being arrested by the police made disclosures to them pointing out several houses which had been broken into, whereon he was released and made a witness. It appears that these facts were only discovered by the Magistrate at the trial. The Magistrate treated the procedure of the police as irregular; and, having come to the opinion that Hari was an accomplice in other similar offences he was about to try, he directed that he should be arraigned with the rest of the accused, and afterwards Hari was tried and convicted in these other cases. When this Court admitted Mona's appeal, a report was called for on the procedure under which Hari had been brought as a witness in the trial of the present case. The appeal has been argued for the Crown by Mr. Branson. On the question of fact, we concur in opinion with the Magistrate that Hari had been arrested by the police as a person concerned in the offence. It is admitted that Hari was released by the police, and that he had obtained no discharge from a Magistrate when examined as a witness. It is not necessary for the decision of the case to determine whether the testimony of Hari was admissible in evidence, but, on consideration of the Magistrate's report, we asked Mr. Branson to argue the point.

There has been a correspondence between the Magistrate and the Government on the general question of discharges, and the Magistrate has sent up a copy of Government Resolution No. 5421 of 1891, which was passed thereon on the 10th October, 1891. It appears that the Magistrate's views are the following:—"A Magistrate may, under section 337 of the Code of

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Criminal Procedure, tender a pardon to an accused person for obtaininig his evidence in a case exclusively triable by a Court of Sessions; that a pardon cannot be granted in a case triable by a Magistrate; that if a Magistrate cannot pardon, the police cannot do so; and that there is no section which allows the police to release persons who have been arrested and make them witnesses in order to secure convictions against other accused who have been concerned in the same offences." Mr. Hamilton added that no person arrested by the police can be discharged except by a Magistrate. The Commissioner of Police stated that the police have the strictest orders never to discharge a person once made a prisoner, but to release him on bail to appear before a Magistrate the next day: and that the procedure adopted in Bombay on occasions when the police desire to make a prisoner a witness in a case, which procedure has been recognized by successive Presidency Magistrates, is this, *viz.*, that the police place the prisoner before a Magistrate with the facts of the case, asking the Magistrate to discharge the prisoner; and on his discharge they, with the Magistrate's permission, make him a witness. The Government of Bombay in their Resolution on the correspondence say: "Persons actually arrested ought to be, and it appears are, taken before a Magistrate. An entry should be made, and, it appears, is made of the arrest, and in trifling cases bail should be taken for the appearance of the accused person before a Magistrate. It is then for the Magistrate to determine what further proceedings should be taken, and whether there is any ground for treating the person thus brought before him as an accused or a witness."

It seems from this correspondence that the police and the Magistrate do not differ as to what the practice should be. As stated, it appears to us the proper practice, being quite in accordance with the directions of Act XIII of 1856, sections 90 to 92. This practice probably existed as the law in this island before the Statute was passed, it being in accordance with the law of England as laid down in *Wright* v. *Court*[1]; *Beckwith* v. *Philby*[2]; Burn's Digest, "Arrest without Warrant." The same principles have been substantially adopted by the Legislature

(1) 4 B. & C. 596. (2) 6 B. & C., 635.

in the Codes of Criminal Procedure for the mofussil. We may refer to sections 59 to 63, 169, 170, 496 and 497 of the present Code. The details of procedure are not precisely the same, as only sections 54, 55, 56, 68, 84, 127 and 202 of the Code apply to the police of the island of Bombay. Section 63, which requires the police to report to the Magistrates the cases of all persons arrested without warrant, has not been extended to them. We find that the Judges in Chambers resolved on the 3rd February, 1888, that it is important that the Magistrates should know, when persons are arraigned before them, the dates when the arrests took place, and expressed an opinion that the law contained in section 90, and other sections of Act XIII of 1856, as to detentions, implies the earliest convenient appearance of accused persons before a Magistrate. These are matters of arrangement, and it is not necessary to do more than allude to them. The law appears to be generally known to the police as well as to the Magistrates, and to be worked with due regard for personal liberty. The Government encourage Magistrates to report any particular abuse; and it may be added that a constable who arrests, and then, without any reference to the Magistrate, discharges any person, stands in double peril, of a suit for damages on the ground that the arrest must have been wanton, or of prosecution by the authorities on the ground that he has let a criminal escape.

The point, however, argued before us is whether such an arrested person, so discharged, is a competent witness in the case. A person never arrested, and against whom no process has issued, is a competent witness even if a principal offender (*Tinkler's Case*[1]). So where a complaint was made to a Magistrate against A and B, and process issued against A only, B was held a competent witness on his behalf (*Mohesh* v. *Mohesh*[2]). But where a Magistrate had issued a warrant against two persons for theft, and they were brought before him, and the Magistrate tendered them a pardon, such tender being illegal, and took their evidence as witnesses, and they gave evidence also at the Sessions trial, it was held that being accused persons, and not having been legally pardoned, they could not be examined as witnesses until

(1) 1 East., P. C., 354. (2) 10 Calc. L. R., 553.

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they had been acquitted, or discharged, or convicted. Their evidence, therefore, was rejected as absolutely inadmissible, (*Reg.* v. *Hanmanta*[1]). The learned Judges give the following reasons:—"Moro and Rámchandra were before the Magistrate as accused persons. Section 344 of the Code lays down that, except as provided in section 347, no influence, by means of any promise, or threat, or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge. Section 345 prescribes that no oath or affirmation shall be administered to the accused person." The sections quoted appear as sections 342 and 343 of the present Code. The Court declined to take *Rudd's case*[2] as an authority on the law of evidence; and they must have held that the action of the Magistrate did not remove Moro and Rámchandra from the category of "accused persons" within the meaning of those words in the sections quoted. The case of *Reg.* v. *Remedios*[3] was probably decided on similar grounds. These two cases are approved and followed by the Allahabad Court in *Empress of India* v. *Ashghar Ali*[4], where also section 24 of the Indian Evidence Act is quoted along with section 344 of the Code as making the evidence of the illegally pardoned witness inadmissible. He is there treated as still an accused person. *Reg.* v. *Hanmanta* has been followed as an authority here in *Queen-Empress* v. *Dala*[5]. In *Imperatrix* v. *Liládhar*[6] the reasoning in *Hanmanta's case* is extended to the case of an accused person against whom the Magistrate illegally allowed the charge to be withdrawn; his subsequent evidence as a witness was held inadmissible. In *Queen* v. *Behary Lall*[7], the Judges say: "There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution."

None of these cases touch the present, where the arrested person has not been brought under the notice of a Magistrate until he is put in the witness box. There is a case, however,

(1) I. L. R., 1 Bom., 610, at p. 618.

(2) 1 Cowp., 331.

(3) 3 Bom. H. C. Rep., 59, Cr. C.

(4) I. L. R., 2 All., 260.

(5) I. L. R., 10 Bom., p. 190.

(6) Cr. Rule 18 [1] 1889.

(7) 7 W. R., 44. Cr. R.

of which I have a report (in the Judicial Commissioner of British Burma's Circulars, 1884, No. 20). One Shwe Wa was examined as a witness for the prosecution in the Court of the Recorder of Rangoon, where the Code of Criminal Procedure is in force. He had been arrested by the police, and the police superintendent, without sending him before a Magistrate, wrote to the District Magistrate that he was willing to make a full confession, and to assist in arresting the persons who had committed some recent dacoities and in recovering the stolen property. The police superintendent asked the Magistrate to furnish him with a pardon under section 337. There was no case of dacoity pending before the Magistrate, and it is difficult to see how section 337 applied. The District Magistrate wrote out some conditions on which he asked the police superintendent to tender the pardon. Shwe Wa's evidence helped to secure convictions against several persons for one of these dacoities in the Court of the Recorder. They appealed to the Special Court, where the Judges—of whom I was one—differed in opinion as to whether Shwe Wa's evidence was admissible. The view I expressed was that the pardon was illegal as an inducement contrary to sections 163 and 343, and was not tendered as required by sections 337 and 338. I also objected that Shwe Wa was an "accused person," and that section 342 forbad his being examined on oath, citing *Hanmanta's case* and referring also to sections 170, 208 and 209. The Recorder considered that "no pardon was necessary, for Shwe Wa was never an accused person,—*that* is, he was never presented in that aspect either before the committing Magistrate, or before the Court of Sessions." The reference went up to the High Court at Calcutta where Romesh Chunder Mitter and Field, JJ., ruled as follows:—"Whether the evidence of the witness Shwe Wa was admissible? In answering this question it must be borne in mind that the statements of this man are not being considered as affecting himself and his liability to punishment, but only as affecting third persons against whom they are offered in evidence. Under the circumstances as disclosed in the record, and in the statement sent up by the learned Judges below, we are of opinion that the evidence of this witness was admissible, though of course the facts connected

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with his testimony and the circumstances under which this individual came to appear in the witness-box should properly have been pointed out to the jury in order to enable them duly to estimate the value of the evidence itself. Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted."

The above ruling may be distinguished from that in *Reg.* v. *Hanmanta*[1] on the ground that Shwe Wa had never been brought before a Magistrate, or released on bail with condition to appear before a Magistrate. It supports the view that a person in Hari's circumstances is an admissible witness. It is true that in chapter XIV of the Code, which deals with investigations on information or otherwise, the word "accused" or "accused person" is used in several sections (*e.g.*, sections 167, 169, 170 and 173) as a designation of supposed offenders who have not yet come under the cognizance of any official but the police, and who in chapter V are called "persons arrested." Similar words are used in sections 496 and 497 about the bailing of persons arrested or detained by the police, and in section 344 about postponing a trial not yet commenced. In section 167 also the word "accusation" is used. This language seems to show that these words are not always confined to persons already before the Magistrate, or who have been brought under his notice by reports or recognizances. But if we are to follow *Hanmanta's case*, the question arises, What is the meaning of the last sentence of section 342, "No oath shall be administered to the accused"? The decisions can best be explained by holding that by "the accused" is meant a person over whom the Magistrate or other Court is exercising jurisdiction; and on the whole we think this restricted meaning best suits the context.

The result is that we think Hari, though illegally discharged, was a competent witness under section 118 of the Indian Evidence Act. As laid down by the learned Chief Justice in delivering the judgment of the Full Bench in the case of *Ganesh*

(1) I. L. R., 1 Bom., 610.

Náráyan Sáthe[1], one great end of criminal procedure is the prevention and punishment of crime. We think, after considering the record in the present and the other two related appeals, that this end has been attained by the police in securing the punishment of the gang of habitual thieves who have been convicted. How far Hari contributed to the result we are unable to say. He seems to be an accomplice, though perhaps he repented, and by disclosing the doings of the other thieves came under the denomination of informer.—(See note to section 133, Field's Law of Evidence.) The authorities have a right to seek this aid just as the Government has a right to make use of spies, who do not deserve to be blamed if they instigate offences no further than by pretending to concur with the perpetrators. (Per Maule, J., in *Reg.* v. *Mullins* [2].) It may be that Hari's behaviour entitles him to some clemency from the Crown; but this is a matter for the Magistrate and the Commissioner of Police to consider.

Conviction and sentence reversed.

(1) I. L. R., 13 Bom., at p. 597. (2) 3 Cox, C. C., at p. 531.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* GOVIND.*

1892. *February 8.*

A'bkári Act (Bombay V of 1878), Sec. 45, Cl. (c)—Omission to keep the minimum quantity of liquor according to the terms of license, not an offence under the Act.

Where the accused, who was a licensed liquor contractor, omitted to keep in his shop the minimum quantity of liquor required by the terms of his license,

Held, that the omission of the accused did not come within the meaning of section 45, clause (c) of the Bombay Ábkári Act (V of 1878).

THIS was an appeal by the local Government from an order of acquittal passed by H. Unwin, Sessions Judge of Kárwár, in the case of *Queen-Empress* v. *Govind.*

The accused was a licensed liquor contractor. He was charged with having broken the conditions of his license by failing to

* Criminal Appeal, No. 288 of 1891.