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simple imprisonment. The reasons given by the trying Magistrate for the conviction were as follows:—

"There are two counts against the accused,—one that he abused and insulted the complainant, the other that he intimidated him. The abuses are said to be foul abuses and the intimidation was a threat by the accused to get the complainant dismissed. I think the first count has not been proved, but the second count has been. The intimidation has been clearly borne out by the evidence of Báloba and Bála Dangi. There may have been hot words between the complainant and the accused as regards the making of the panchnáma. Still the accused has no business to intimidate the complainant in the manner alleged. The defence is not reliable, as the witnesses are almost all the tenants of the accused. Regarding abuses, I think the evidence is discrepant and it is fair to acquit the accused. Regarding intimidation, I convict the accused."

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction.

Náráyan Vishnu Gokhale, for the accused, referred to *Reg.* v. *Moroba Bháskarji*[1] and *Reg.* v. *Alya Dhurma*[2].

There was no appearance for the Crown.

PER CURIAM:—Following *Reg.* v. *Moroba*[1] and *Reg.* v. *Alya Dhurma*[2] the Court sets aside the conviction recorded against, and the sentence passed upon, Dádá Hanmant Dáni, and directs the return of the fine.

Conviction and sentence reversed.

(1) 8 Bom. H. C. Rep., Cr. Ca., 101. (2) Cr. Rul. of 17th August 1870.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ránade

QUEEN-EMPRESS *v.* TA'TYA BIN APPA'JI.*

1895. *September* 4.

Evidence Act (I of 1872), *Sec.* 26—*Confession—Police custody—Jailor in a Native State.*

The custody of the keeper of a jail in a Native State, who is not a police officer, does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, section 26 of the Indian Evidence Act (I of 1872) does not exclude such a jailor from giving evidence of what the accused told him while in jail.

* Confirmation Case, No. 21 of 1895.

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THIS was a case submitted to the High Court by C. G. W. Macpherson, Sessions Judge of Belgaum, for confirmation of the sentence of death passed upon the accused Tátya bin Appáji.

The accused was convicted of murdering one Bábáji Guzar at Benadi, in the district of Belgaum, on the 28th July, 1894. After the murder he absconded and was not found for some time. On the 24th February, 1895, he was arrested and confined in Kurandvád, which is a small Native State near Belgaum. While in jail at that place awaiting extradition he made two confessions to the jailor. At his trial in the Sessions Court at Belgaum the prosecution proposed to put in these confessions as evidence against the accused. For this purpose the jailor was called as a witness, and he gave the following evidence :—

"He (accused) twice made a statement to me in regard to this offence. He was on each occasion in my custody. I am a jailor and also jail jamádár. I am not a policeman. The warders are police constables. They keep watch, accompany the prisoners when they go to answer calls of nature, and supervise them when they are at work. They also lock them up at night, I superintending the work. There are generally from eighteen to twenty prisoners in the jail, and there are eight of these constables. They are under me and not under the chief constable when they are serving in the jail. I get my pay from the Mulki Department. The constables officiating under me do not perform ordinary police duties. I feed the prisoners and assign to them their task work. The police constables assigned to me as warders may remain with me a month or fifteen days or any longer or shorter period. There is no fixed time."

Upon this evidence the Sessions Judge ruled that the confessions were not admissible. His reasons were as follows :—

"I am of opinion that the confession made to this witness, and which it is proposed to put in, is inadmissible under section 26 of the Evidence Act. The witness, who is the Kurundvád Jailor, is not a police officer, but his eight warders are police constables, though while serving under him they are, it is said, relieved of police duties. They are not, however, relegated to jail work for any specific time, and a man may apparently be a warder one day and a police constable the next and *vice versâ*. I think, therefore, that these warders must for the purposes of section 26 be regarded as police constables. It follows that the accused was in custody, ⅞ths of which was police custody, and I think that for the purposes of section 26 of the Evidence Act he must be regarded as having been in police custody. *The Queen* v. *Hurribole Chunder Ghose*(1) is in point. If the arrangement in question were in British territory, I should hold this view, and I think it must be held *a fortiori* in the case of a small Native State."

On the other evidence, however, in the case the jury found him guilty of murder, and the Sessions Judge sentenced him to death.

(1) I. L. R., 1 Cal., 207.

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On the case coming on to the High Court for confirmation of the sentence of death,

P. M. Mehta (with *Vásudeo Gopál Bhandárkar*) appeared for the prisoner.

Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader, for the Crown.

Branson, with him *Dhondu Pándurang Kirloskar*, for the complainant:—The prisoner was not in police custody when he made the statement to the police, and the statement is, therefore, admissible in evidence. The Sessions Judge held that the jailor is not a police officer and yet excludes the statement. The warders, who are police constables, were not present at the time the statement was made, the prisoner being in the custody of the jailor himself. It is like a statement made to the superintendent of a jail in British India. A police officer means a police officer of British India.

P. M. Mehta in reply:—The custody was that of the police superintended by the jailor. Section 26 of the Evidence Act applies: see *The Queen* v. *Hurribole Chunder Ghose*[1].

JARDINE, J.:—Upon the evidence before us, *viz.*, that of the kepeer of the foreign jail, we must hold that he is not a police officer, and assuming that the prisoner, when in that jail at Kúrandvád, was in his custody as he says, we are of opinion that the custody of the jailor did not become the custody of a police officer, merely because his subordinates, the warders of the jail, were members of the police force of the Kurandvád State. There is no suggestion of a close custody of the prisoner inside the jail, such as may possibly occur when a prisoner is watched and guarded there by the police officer investigating the offence. We are, therefore, of opinion that, on the materials before him, the Sessions Judge was wrong in holding that section 26 of the Indian Evidence Act I of 1872 excluded the jailor from giving evidence of what the prisoner told him. Unless there be other material or other objection to admissibility, such evidence should be taken, and inquiry made into all the circumstances concerning the making of the statements, who were present, and what the

(1) I. L. R., 1 Cal., 207.

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contents were, and of course the date. The Sessions Judge should take the evidence of the jailor, and any other person present, and the prisoner should be allowed to question the witnesses, and to call any witness whose evidence can be procured without unreasonable delay or expense, and who can testify as to what occurred at the time. The evidence should be certified to this Court as soon as possible, and within three weeks.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ra'nade.

1895. *September 9.*

GANGA'RA'M CHIMNA PA'TEL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Failure of plaintiff to prove title—No evidence of defendant's title—Effect of plaintiff's possession—Plaint—Prayer for general relief—Practice—Specific Relief Act (I of 1877), Sec. 42.

The plaintiff who was in possession of certain land sued for a declaration that the defendant had no title to it and that it belonged to him. The plaint also contained a prayer for general relief. At the trial both plaintiff and defendant failed to prove any title to the land, but the plaintiff proved that he had been for ten years in possession and had built a shed on it.

Held, that no declaration of this plaintiff's title could be made; but

Held, on the authority of *Ismáil Ariff* v. *Mahomed Ghouse*(1), that the plaintiff was lawfully entitled to the land and to the shed thereon.

APPEAL from the decision of A. Steward, District Judge of Khándesh, in Suit No. 1 of 1893.

Suit for declaration of title. The plaintiff sued the Secretary of State for India in Council for a declaration of his title to a piece of ground with a cattle-shed on it situate in the village of Juwardi, táluka Páchora, in the Khándesh District, which plaintiff alleged to be his ancestral property and also to have been given to him by his uncle Fulji. The plaint stated that the pátel and the kulkarni of the village had submitted a report to Government stating that the said piece of ground be-

* Appeal, No. 139 of 1894.

(1) L. R. 20 Ind. Ap., 99.