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applies to the evidence that he had concealed certain bonds, which evidence again is not free from suspicion. The only remaining point is that accused 1 agreed to a reference of the dispute to arbitration, but that again is no evidence that the will is not genuine. As pointed out by the Judge in his charge, accused 1 agreed to the reference on certain terms, one of which was that he should get Rs. 10,000 from the property. Such a conditional consent can by no means be construed into an admission that the will was forged. Besides, there was the chance of the will being attacked on the ground of its invalidity. Many motives lead parties to agree to the compromise of a dispute privately, and the chief among them is the buying of peace and the avoidance of litigation : and when they do so agree the natural presumption is not that each necessarily admits his claim to be false, but rather that each gives up and waives his extreme contention and consents to an amicable settlement by third parties as arbitrators.

The conclusion we have come to is that the prosecution has failed to prove the case against the accused, that the verdict is manifestly wrong; and indeed for the Crown no attempt was made to support the convictions on the evidence legally admitted. We must, therefore, set aside the verdict of the jury and acquit all the appellants and direct that they be discharged.

APPELLATE CRIMINAL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Batty.

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EMPEROR *v.* MALGOWDA BASGOWDA.*

Sessions Judge—Jury—Summing up—Defective direction—Contentions placed before the Jury—Judge should not omit pointedly to call attention of the Jury to matters of prime importance especially if they favour the accused.

A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused, merely because they have been discussed by the advocate.

* Criminal Appeal No. 261 of 1902.

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APPEAL from the conviction and sentence recorded by J. C. Gloster, Sessions Judge of Belgaum, in a sessions trial under sections 467 and 471 of the Indian Penal Code.

One Tukaram bin Ravji claiming to hold a certain land as the tenant of one Godu Naikin brought a possessory suit in the Court of the Mámlatdár of Chikodi complaining that an obstruction was caused to his possession by the accused Malgowda bin Basgowda, who in support of his contention that he was the owner of the land, produced a sale-deed, dated the 22nd July, 1877, executed in his favour by one Parappa bin Chanappa. The Mámlatdár found the sale-deed to be a forgery and gave sanction for the prosecution of the accused. He was, thereupon, tried in the Sessions Court at Belgaum on two charges, namely: (1) that he forged or used as genuine knowing to be forged a sale-deed in the Court of the Mámlatdár of Chikodi in July, 1901, and thereby committed an offence punishable under sections 467, 471 of the Indian Penal Code, and (2) that at the time and place aforesaid he corruptly used as true the aforesaid sale-deed knowing such evidence to be false or fabricated and thereby committed an offence punishable under sections 193, 196 of the Indian Penal Code.

The Judge in his charge to the jury made the following observations :—

* * * * * * *

The first and the main question to which you must direct your attention is whether it is established beyond reasonable doubt that the document in question (Exhibit A) is a "false document" (section 464, Indian Penal Code). The prosecution alleges that it is a "false document" either

(*a*) as not having been in fact executed by Parappa by whom it purports to have been executed,

or

(*b*) as having been written not in 1877, as it purports to have been, but at a later date,

or

it may be a false document in both these ways. There must also be a dishonest or fraudulent intention in order to bring it within the definition in section 464, Indian Penal Code.

As you have observed a large mass of evidence deals with questions which may be described as of a "civil" character, you must be careful to assign to this portion of the evidence its proper position and not lose sight of the main

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question stated above whether in the first instance it is proved to your satisfaction and beyond reasonable doubt that Exhibit A is a "false document."

You will remember too that if there is a reasonable doubt accused must get the benefit of it: and you will remember that the burden of proof is on the prosecution: you are not directly concerned with the question who is entitled to possession of the land or who has been paying its assessment—these are only subsidiary questions—, nor have you to decide whether the accused has proved that the document is genuine. It is for the prosecution to prove to your satisfaction that it is *not* genuine.

The evidence regarding the litigation of 1869, regarding the alleged sale by Ningappa to Godu, and the latter's lease to Tukaram and regarding the latter's possession of the land is only of incidental value, as showing a motive for the alleged forgery, or the existence of circumstances which render probable the prosecution story regarding the forgery. I do not say you should ignore this evidence, but you must be very careful to assign to it its proper place. And you will observe that it would be quite possible to accept as wholly true the prosecution theory regarding the litigation of 1869 and its results, the purchase by Ningappa at a Court-sale, Ningappa's sale to Godu and all these other incidental matters, and yet it would by no means necessarily follow that the document in question was a forgery. I ask your special attention to this last remark.

The evidence on both sides has been carefully summarized by pleaders on both sides and I will not go through it in detail but will endeavour to indicate generally the points to which your attention should be specially directed.

Keeping in view the above remarks turn to the evidence of the first witnesses. It is for you to decide whether you accept Godu's story regarding her purchase and subsequent lease to Tukaram. Discrepancies in their story have been pointed out and you must decide whether these discrepancies are vital. As opposed to their evidence, the defence call several witnesses who testify to the possession of accused and Parappa. Many of these witnesses merely state generally that accused, or Parappa, was "in possession." As the Public Prosecutor points out, there is not much scope for cross-examination on evidence of this character; you will look at the evidence on both sides and decide whether you consider it established that Tukaram has been in possession of the land as alleged by the prosecution: still remembering that this is only one of the subsidiary questions.

Then there is the evidence regarding the litigation of 1869. The Public Prosecutor has carefully and I think fairly, reviewed the documents on which he relies, and looking to that evidence as a whole, it does in my opinion go to support his contention that in that litigation Chanappa, the father of Parappa, the alleged executant of Exhibit A, was worsted, at all events for the time.

But on the other hand those papers also go to show that he was prosecuting a claim *bonâ fide*: for instance the document, Exhibit 15, goes to show that Chanappa claimed to hold the land as tenant of Morbhat, one of the parties to the litigation, and it would not be impossible to suppose that notwithstanding Chanappa's failure to establish his position in 1869, accused might still—eight

years later (in 1877)—have purchased Chanappa's interest for what it was worth, taking the risk of litigation.

Then the Public Prosecutor had laid stress on the fact that the accused as officiating Patel signed certain summonses, prohibitory orders, &c., in those proceedings which must have shown him that Chanappa's claim was disallowed. The argument being that with this knowledge he would not have been so foolish as to purchase the land from Chanappa's son in 1877. It is for you to decide how far this argument is entitled to weight. I would merely point that in those proceedings accused was merely acting in his official capacity as a village officer and you are hardly entitled to judge his conduct in the same way as if he had been a party interested in those proceedings. Further, the alleged sale took place eight or nine years later in the course of which period circumstances may have altered.

Leaving these incidental questions which, as already explained, bear only indirectly on the question before you, turn to the more direct evidence. The document, Exhibit A, purports to have been written by Shamrav Govind, and that is the allegation of the defence. This witness (No. 7 for prosecution) denies having written it. If you accept his evidence it goes far to support the prosecution theory that the document is a forgery, for if it is a genuine document why should the parties allege that it was written by a person by whom it was not written. But before accepting his story you should consider his evidence very carefully. You have also seen the specimen of his handwriting (Exhibit 33) made in Court in your presence, and you have had an opportunity of comparing it with Exhibit A. He pronounces against the document because (he says) his handwriting in 1877 would not have been so similar to his present handwriting. Do you consider this convincing? Then remember his story as to accused approaching him before the proceedings in the Magistrate's Court. He says that accused gave him no hint of any foul play, yet without seeing the document he, the witness (Shamrav), at once stated that he had not written it. Is there not some reason to suppose that he is keeping something back?

The Public Prosecutor has told you that in his opinion Shamrav may not improbably have written the document. That view suggested itself to me also. But it is a question of fact of which you are the judges. If you think that view is correct you have then this position to face. Either he wrote the document—at all events so far as the date is concerned—or else he wrote it on some other occasion, and if so can you doubt that he knew of and was party to the false entry of the date? In this latter case he would be in the position of an accomplice and his evidence would have to be received with the greatest caution.

You have to consider the evidence of Satyappa (witness No. 3 for defence) who states that he attested the sale-deed. He testifies to its genuineness. He too has given a specimen of his signature (Exhibit 96) and you have compared it with Exhibit A.

Then there is the evidence of Parappa, the alleged executant. He now says that he did execute it, and he therefore gives no assistance to the prosecution.

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But his previous evidence before the Mámlatdár (Exhibit 37) was to contrary effect. This same Survey No. 95 was then in question (1901) and he denied having sold it to accused, who was a co-defendant in those proceedings. You have heard his attempted explanation—that he thought another field was in question. But the plaint (Exhibit 41) shows that the case was confined to this survey number only. Do you think it probable that Parappa can really have been unaware of what the dispute was about? Then you have heard him deny *seriatim* the statements which he is said to have made before the Mámlatdár in his deposition (Exhibit 37). Do you attach more weight to that record duly taken or to the witness's memory? The prosecution say that his previous evidence was true and his present story false. It is for you to decide if this is so.

But even if you accept this view you are not entitled to ignore his present testimony and treat his previous statement as evidence against accused. What you have to decide this case on is the evidence adduced here *before you*, and the utmost use the prosecution can make of the previous statement is to say to you "The witness now admits execution of the sale-deed, but we show you his diametrically opposite statement of last year. So you must attach no weight to his present testimony."

The above remarks cover the greater portion of the evidence and I do not think it necessary to go in detail through all the documents, which have been carefully put before you by pleaders on both sides. Do not lose sight of the fact that it is *for the prosecution to establish* that the document, Exhibit A, is a "false document."

If you hold this not established then the charge under sections 467, 471 falls to the ground. If you consider it is proved that Exhibit A *is* a "false document" then see whether the evidence establishes that accused dishonestly or fraudulently made it for one or other of the purposes mentioned in section 463, the words "to support any claim or title" or those on which the prosecution relies in this case.

There is no direct evidence of his making the document, but if it is proved that he dishonestly or fraudulently used it as genuine knowing it to be forged, then section 471 makes him liable as though he had actually forged it. If you hold it proved to be forged, then it being admitted that he used it, can you doubt that he did so fraudulently and knowingly.

Remember that in case of a reasonable doubt accused must get the benefit.

Turning to the second charge under sections 193 and 196, Indian Penal Code, in respect of which you will give me your opinion as assessors, I read to you section 192, Indian Penal Code. The prosecution contends that even if though forgery be not proved still the document contained a false statement as to Parappa handing over possession of the land, &c.

It is for the prosecution to establish the ingredients of the offence. I need hardly point out to you that in many documents, mortgage-deeds and others, loose statements as to one party being in possession are sometimes made, but though they be incorrect or untrue it does not follow that the offence of fabricating false evidence has been committed. You must be satisfied that the

statement is wilfully false and made with the intention specified in section 192 to which I again direct your attention. Are you satisfied of this in the present case? If so you will ask yourselves the further question whether it is proved that accused used this "fabricated" evidence as genuine, with corrupt motive and knowing it to be false.

You observe that there is a difference between a false statement in a document and a "false document" (as defined in section 464); hence the two charges.

Give the whole case your careful consideration.

The jury unanimously found the accused guilty of the offence charged under sections 467, 471, Indian Penal Code, and as assessors they were of opinion that he was not guilty under sections 193, 194, Indian Penal Code. The Judge thereupon put the following question to the Jury.

Q.—I may take it then that your verdict of guilty under sections 467, 471, is based on the finding either that the document was not executed by Parappa or that it was not executed in 1877 on the date on which it purports to have been executed or that both these conditions were fulfilled?

A. (of Foreman).—Yes.

The Judge accepted the unanimous verdict of the jury and convicted the accused of forgery of a valuable security under sections 467 and 471, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for two years. Under section 240 of the Criminal Procedure Code further inquiry into the charge under sections 193, 194 was stayed.

The accused appealed urging that—

The verdict of the jury was perverse and erroneous on the face of it.

The jury having found that there was no evidence that the accused knew that Exhibit A was false, the Judge ought to have himself applied the law and acquitted the accused instead of asking the jury any further question.

The Judge having asked the jury on what finding their verdict was based, ought to have ascertained from the jury the specific finding that they had arrived at and ought not to have accepted the simple answer "yes" to his question to the jury.

In the absence of any evidence that the document was not executed on the date on which it purports to have been executed, or that the document was executed on any particular date, and having regard to the fact that the prosecution admitted that the

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document was probably written by the person by whom it purports to have been written, there was no evidence before the jury of the document being a false document.

The Judge was in error in not summing up to the jury the evidence on both sides.

The Judge was in error in not admitting in evidence certain documents produced by a witness for the prosecution though some of them were certified copies of Government records and some were more than thirty years old, and in not giving proper facilities to the accused to prove certain other documents produced by the same witness.

The Judge was in error in allowing prosecution to adduce evidence which was not adduced before the Committing Magistrate and at the same time not giving the accused any adjournment in order to be ready to meet such fresh evidence.

Branson (with *V. V. Ranade* for *H. S. Dikshit*), for the appellant (accused).

Ráo Bahádur *V. J. Kirtikar* (Government Pleader), for the Crown.

PER CURIAM:—The accused in this case has been found guilty of having forged a valuable security and of using the same as genuine, knowing or having reason to believe that it was forged. There were other charges preferred against the accused on which the jurors sitting as assessors expressed an opinion favourable to the accused. But we are now concerned only with the charges under sections 467 and 471, Indian Penal Code. Mr. Branson has pointed out that there was inconsistency between the verdict of the jury as such and the opinion expressed by the same individuals as assessors. If we were to limit ourselves to an examination of the words used, and to read them in their strictest sense, there would be great force in Mr. Branson's argument. We think the explanation of this apparent inconsistency is to be found in the meaning which the assessors must have attributed to the question proposed to them in the light of the Sessions Judge's direction to them on the second charge. But it is unnecessary to elaborate on this point, because there are other and more substantial grounds on which we cannot allow the present verdict to stand.

Mr. Branson has said, and we agree with him, that the charge of the Judge in many respects leaves nothing to be desired. On most points the charge is admirable, but at the same time there are one or two vital points on which the Judge did not appreciate the real importance of certain portions of the evidence, so that his direction in regard to them has been defective. We accept the view that a Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the advocate. For instance, the evidence of Ningappa, who practically gives the lie direct to the tale set up by the complainant, deserved especial comment, for it was a matter on which he must have been competent to speak; there could have been no mistake on his part, and he must therefore have intentionally spoken either falsely or truly. The Judge ought therefore to have expressly contrasted the evidence of Ningappa on the one side, the evidence of the prosecution on the other. Another matter which demanded special comment was document A: the date of that stamp paper, the endorsement of the stamp vendor, the signature of the attesting witness who is dead, all ought to have been specially commented on. We are quite conscious that even if it were made clear that the stamp was of the year it purports to be, that would not necessarily show that the document was not subsequently fabricated, still the matter should have been brought to the notice of the jury. More important is the fact that the prosecution has failed (for what reasons we confess we cannot understand) to lead any evidence to show whether the stamp vendor whose name appears under the endorsement of that document carried on that business in 1877 or not, for that was relevant to the question of the genuineness of the document. Then again it is nowhere suggested in the evidence that the signature of the attesting witness Parappa (who is said to have been dead several years, not less than 10 years), was a fabrication. This we think to be a matter of great importance, because manifestly if that was a genuine signature, the document could not have been of recent fabrication. The attention of the jury should have been

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specifically invited to a consideration of this matter. Then there is a point in which, we think, the jury may have failed to understand the value attributable to the proceeding in which the Sessions Judge described Chanappa as having been *worsted*, because all that this *worsting* consisted of was that the application to have the attachment removed failed on the ground that it was not properly stamped. We do not think that can be said to be a *worsting* which ought to have a material bearing on the question whether a few years after, with knowledge of the fact, a man would be likely to purchase the property from the person so worsted. The last point, but in a sense the most important, is that we think the learned Judge's charge must have induced the jury to attribute to the question of possession and title a subsidiary importance. Now it is curious commentary on this that when we asked the learned Government Pleader (than whom no one is more competent to deal with cases of this kind), what really was the direct evidence on which he would suggest that the forgery was made out, he answered that he relied on the evidence which proved that Godu's title had been made out. This appears to us to have been an answer he could not have failed to give, but manifestly if that be so, the title and the possession accompanying it were not of subsidiary but of prime importance. These grounds, therefore, without discussing the others urged before us, justify us in saying that this case, with all its doubts, has not been satisfactorily dealt with. Mr. Branson has further pointed out that certain evidence was improperly excluded. We should have been glad if we were in a position to deal with this point. But we do not know with precision what the excluded documents were and what they contained. All we know is that it is alleged that these documents contained valuable materials for the purpose of determining with whom title and possession to the property in question was in 1877 and prior to that date. If that be so, these documents did deserve a place in the records of this trial; and when the case comes for rehearing we have no doubt the learned Judge will consider how far the documents are of the description attributed to them before us. We refrain from expressing any opinion about them.

With these remarks we set aside the verdict and sentence and send back the case for a fresh trial.