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opinion the *rajinama* and the *kabulayat* of the year 1879 effectually extinguish the plaintiff's equity of redemption. We must, therefore, now reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with all costs upon the respondent throughout.

Decree reversed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Heaton and Mr. Justice Shah.

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March 9.

EMPEROR *v.* HANMARADDI BIN RAMARADDI.*

Criminal Procedure Code (Act V of 1898), section 162—Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872), section 157.

During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed. When examined before the committing Magistrate, she denied the presence of the boy at the scene of the offence. At the trial before the Court of Session, she admitted the presence of the boy. The statement that the witness had made in the investigation was sought to be proved at the trial by the oral deposition of the police officer to whom it was made. The defence objected to this deposition on the ground that it offended against the provisions of section 162 of the Criminal Procedure Code. The Sessions Judge overruled the objection and let in the evidence. The accused having appealed,

Held, that the police officer could be allowed to depose to what the witness had stated to him in the investigation, for the purpose of corroborating what she had said at the trial.

APPEAL from conviction and sentence recorded by E. H. Leggatt, Sessions Judge of Dharwar.

The facts were that, on the 20th August 1913, one Rama Valikar and his wife Honnava started from Makrabi to Haveri. They were later on joined by the accused, who was intimate with Honnava. The party rested for

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their meals on the way, at the Haleritti *nalla*. They finished their meals; and while they were resting, the accused attacked and killed Rama. The accused then dragged the body of the deceased and concealed it in a bush near the *nalla*. This was seen by a Kurbar boy named Gudda.

The accused was tried by the Sessions Judge for the murder of Rama. Gudda was examined as a witness. He deposed to having seen the accused dragging the body of the deceased to the *nalla*.

At the investigation into the case Honnava stated to the police officer that she had seen the Kurbar boy Gudda at the scene of the offence. This statement was reduced to writing. Before the committing Magistrate, however, she denied having seen the Kurbar boy at the time. In her deposition at the trial before the Sessions Court she again reverted to her first statement and deposed thus: "The accused then dragged my husband's body towards the *ketki* bush. At that time I saw a boy from Haleritti. He stood there and then got frightened and ran away."

The investigating police officer was also examined as a witness at the trial. He deposed as follows to the statement made by Honnava about the Kurbar boy in the investigation carried on by him: "Honnava did tell me that when her husband's body was being dragged along a boy came to the *nalla* for water but being frightened he ran away." The defence objected to this evidence on the ground that it was inadmissible under section 162 of the Criminal Procedure Code. The learned Sessions Judge allowed the evidence to go in on the following grounds:—

The Public Prosecutor wishes to elicit from the witness a statement made to him by one of the witnesses in the course of the investigation for the purpose of corroborating the statement of the witness before this Court. Mr. Bellary objects that the statement is inadmissible under section 162, Criminal Procedure

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Code. He refers to 12 Bom. L. R. 663, I. L. R. 22 Bom. 596 and 32 Bom. 111. The Public Prosecutor relies on I. L. R. 36 Cal. 281.

Ruled that the statement is admissible. The case of *Emperor* v. *Akbar Badu* (12 Bom. L. R. 663) differs, as the question there was whether such a statement could be used to corroborate, not the statement of the witness in the Sessions Court, but the statement of the witness before the committing Magistrate. But one passage in the judgment is significant. It runs: "Only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Evidence Act. Previous statements may be used to corroborate or contradict statements made at the trial, not to corroborate statements made prior to the trial." Therefore, as the statements were not admissible under section 157 of the Evidence Act, they could only be admitted under section 162, Criminal Procedure Code. But this latter section only provides for the admission of such statements on behalf of, and not against, the person under trial. The case of *Imperatrix* v. *Jijibhai Govind* (I. L. R. 22 Bom. 596) does not apply, as in that case it is clear that the writings had been admitted as evidence. In *Emperor* v. *Narayan Raghunath Pathi* (I. L. R. 32 Bom. 111) the question has been discussed, but one Judge was of opinion that the statement could be used by the prosecution by way of corroborating a witness, while another Judge was of opinion that the statement could only be used on behalf of the accused and for the purpose of impeaching the credit of the witness, though both these Judges, and all other Judges of the Full Bench, were agreed that the *writing* could not be used at all. It is to be noted that in that case the question really before the Court was simply whether the writing could be used. The point, however, was directly raised and decided in *Fanindra Nath Banerjee* v. *Emperor* (I. L. R. 36 Cal. 281), where it was held that oral evidence of such a statement was admissible to corroborate the witness' deposition at the trial. I am of opinion that it is only the writing itself the use of which is prohibited by the section, and that the proviso is intended to be nothing more than a proviso to that prohibition. The police papers not being available to the defence they are merely given the right to ask the Court to refer to the writings and to decide whether the accused could have a copy, in which case the statement, *not the writing*, may be used to impeach the credit of the witness. The latter part of the proviso is co-extensive with the former part, and as the former does not refer to the prosecution, who already have access to the papers, the latter part of the proviso is necessarily confined to the defence, but this does not appear to me to have any effect on the use that they may be made of such statements by either the defence or the prosecution. The defence may know what a witness had said to the police and may ask the police for proof thereof without any reference to any writing and may use the statement to impeach the credit of the witness. Similarly, the prosecution may know, as they

usually do know, what a witness had said to the police and may require the police to prove what the witness had said and may use that statement by way of corroboration of the witness' statement at the trial. In such a case too it would not be necessary to refer to the writing at all unless the witness wished to refresh his memory and recourse to the section would be needless. The section seems to me to be intended only to restrict within narrow limits the use of the *writing*. The evidence is therefore allowed.

The learned Judge relied on the evidence of Gudda the Kurbar boy as establishing the identity of the accused, convicted him of the offence of murder, and sentenced him to be hanged.

The accused appealed against the conviction and sentence. The case also came up before the High Court for confirmation.

Velinkar, with *V. V. Bhadkamkar*, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

HEATON, J. :—A certain Hanmaraddi has been convicted of the murder of Rama Valikar and has been sentenced to death. The case comes before us for confirmation of that sentence and also on the appeal of the convict.

It appears that about the 22nd of August 1913 the corpse of a man, whose head was almost severed from his body, was found in the village of Haleratti. On making inquiries the police discovered from the neighbouring villagers that the murdered man had been accompanied by another man and a woman. They were all strangers to that locality. Neither the identity of the murdered man nor that of his companions was at the time ascertained. About a month later, however, the identity of the murdered man came to be suspected. His wife was questioned and thereafter the police were enabled to make complete inquiries. They discovered that the murdered man was one Rama and that his companions were the accused and the deceased's wife Honnava. It was found that Honnava had for some

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time been living at Makrabi where the accused also lived, that her husband had been working at another village Magal, that he had taken his wife from Makrabi for a time and that thereafter he and his wife set out to go to Haveri and were joined on the way by the accused. On their journey these three persons crossed the ferry between Bannimatti and Galagnath, whence they proceeded to the place where the corpse was subsequently found. From there Honnava and the accused returned, spending the night at a village on the way and recrossing the ferry on the following day. This gave the police an opportunity of which they availed themselves of tracing the movements of these persons and identifying the individuality of each. They have been enabled to put before the Court perfectly credible evidence of all the circumstances that I have stated. Then there is the evidence of the dead man's wife Honnava, who describes how her husband was murdered. It is said that she is an accomplice witness. However that may be, we must, in a case of this kind, regard her evidence with caution, because, whether an accomplice or not, she was present at the murder and for weeks thereafter she gave no information about the crime, and it is proved that she had illicit intimate relations with the accused. It does not seem to me to matter in the least whether you call her an accomplice or not. Her evidence must be valued in relation to these circumstances. However, in the light of the surrounding circumstances, from the undoubted truth of the facts that the three persons travelled together, that one of them was left dead where his body was found and that the other two returned to their village together, there can be little doubt that the man was murdered by one or both of them. This conclusion is fortified by the subsequent conduct of the accused himself who gave an untrue

account of his proceedings and had two letters written at intervals of about a fortnight which were designed to induce people to believe that the murdered man was still alive and working in a distant village. Here, again, the evidence is, to my mind, credible and indeed convincing. Taking the circumstances as a whole, they leave no doubt whatever that the accused was the man, whether helped by the woman or not it does not matter, who killed Rama.

The credit of the elucidation of these circumstances is mainly due to the promptness and intelligence of the police inquiry, and for that inquiry, I gather, Balwant Vyankatesh, Sub-Inspector of Haveri, is mainly responsible.

For these reasons I confirm the conviction and also the sentence in this case.

There has arisen and has been discussed a point as to the meaning of section 162 of the Criminal Procedure Code. It appears that amongst the villagers who were near the scene of the offence when the murder took place was a boy who happened to see the three persons. The deceased's wife before the committing Magistrate stated that she had not seen this boy. Before the Sessions Court she stated that she had seen him. On this state of facts the defence might very easily and with no other facts bearing on the point known, with some force argue that the woman had changed her story, that the earliest known account of the matter which she gave was less favourable to the prosecution case than that she gave to the Sessions Court and thereon they might very properly found an argument that the witnesses had been tampered with and that the case presented clear indications of that kind of influence which properly ought to raise doubts in the mind of the trying Judge. To rebut an argument of this kind it was proved from the mouth of the

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investigating police officer that to him the deceased's wife had said that she saw the boy. If what the investigating police officer says be true, then it completely destroys the defence argument. The question argued before us is, whether the police officer could, as the law stands, be allowed to depose to what this woman had said to him for the purpose of corroborating what she said before the Sessions Judge. My own opinion is that the police officer could depose to that effect. I do not propose to discuss the various authorities which have been referred to. Lengthy arguments on this very point find a place in the books. I will only say that I do not think that either by its terms or by its intention section 162 of the Criminal Procedure Code prohibits the Court from receiving such evidence for such a purpose.

SHAH, J. :—I concur. The learned Sessions Judge has examined the evidence with great care in an exhaustive judgment and has considered all the arguments urged in favour of the defence. Substantially the same arguments have been urged before us. Generally speaking I agree with the lower Court in its appreciation of the evidence and with the inferences drawn by it.

It is not disputed before us that the deceased whose body was found on the 22nd August last was Rama, the husband of Honnava, and the evidence in the case clearly establishes the fact.

I accept the evidence of Honnava and Gudda as true in the main. Honnava's evidence, no doubt, must be received with caution, though I do not accept the argument that she is an accomplice. She did not give out her present story soon after the occurrence and gave varying accounts from time to time, which was to a certain extent natural under the circumstances. Having regard to the proved circumstances in the case,

I am inclined to believe her present account that she saw the accused killing the deceased. As to the evidence of Gudda, quite apart from the fact whether he was seen by Honnava or not, I accept it as true, despite the criticism of Mr. Velinkar on his evidence. The fact of the journey of the deceased and Honnava in the company of the accused is proved by reliable evidence in the case. The subsequent conduct of the accused, which I do not propose to examine in detail, lends strong corroboration to the prosecution story. It is enough to refer to his association with the letters, Exhibits 27 and 28. The accused is proved to have taken those letters to Satyava, which appear on the evidence to have been written at his instance. It is proved that the deceased was never at Amlikop. The obvious inference that arises from the proved conduct of the accused is that he was trying to conceal the death of Rama, which was known to him. On a careful consideration of the evidence and the arguments advanced on behalf of the accused, I have no hesitation in coming to the conclusion that the deceased Rama was murdered by the accused. The circumstances connected with the crime demand that the sentence should be confirmed.

The police investigation in this case appears to me to have been made with unusual ability and thoroughness, and affords a telling illustration of the manner in which a case could be investigated without the aid of a confession.

I desire to allude to a point which has been raised before us in connection with Honnava's evidence. It has been pointed out that though she stated before the committing Magistrate that she did not see any Kurbar boy then, she now denies having made that statement, and says that she had seen a boy from Haleritti. It is

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urged that the statement before the committing Magistrate represents the truth. Even then I do not think that the main conclusion in the case is affected in any way. It is urged on behalf of the prosecution, however, that the argument is based upon a misapprehension of facts, and that the Sub-Inspector has been examined to show that Honnava stated before the police that she did see a boy at the time. The question of law that arises is whether the prosecution can be allowed to adduce oral evidence in proof of her statement before the police in order to corroborate her testimony at the trial. Her statement to the police was admittedly reduced to writing, and it is common ground that such writing cannot be used as evidence. Mr. Velinkar contends, and not without force, that it would be unreasonable to allow any oral evidence of the statement to be given, when the writing containing the statement cannot be proved. On the other hand, it is argued on the strength of section 157 of the Evidence Act that the right of the prosecution to prove any statement to corroborate the testimony of any witness under that section is not taken away by section 162 of the Code of Criminal Procedure, which only provides that the writing shall not be used as evidence. The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions bearing on the question. The judgment of Knox J. in *Rustam* v. *King-Emperor*[1] and the observations of Beaman J. in *Emperor* v. *Narayan*[2] represent one side of the question and the judgment of Karamat Hosain J. in the case of *Ruslam* v. *King-Emperor*[3] and the decisions in *Fanindra Nath Banerjee* v. *Emperor*[3], *King-Emperor* v. *Nilakanta*[4] and *Muthu-*

(1) (1910) 7 A. L. J. 468.
(2) (1907) 32 Bom. 111.
(3) (1908) 36 Cal. 281.
(4) (1912) 35 Mad. 247.

kumaraswami Pillai v. *King-Emperor*[1] represent the other side. I have carefully considered the question, and on the whole I incline to the view that looking to the plain language of section 162, Criminal Procedure Code, the *writing* only is excluded from evidence but the right to prove any *statement* made to the police by oral evidence to corroborate the testimony of any witness is not taken away by that section. This conclusion derives support from, or is at least in consonance with, the view taken by this Court in *Emperor* v. *Balaji*[2] in which the Court, while directing a re-trial, ordered that the chief constable should be examined as to the statements made to him by the witnesses during the police investigation. Such an order would be inappropriate, if the oral evidence of the statements were inadmissible. The anomaly, if any, can be remedied by the Legislature. Our duty plainly is to construe the section without unduly straining the language used by the Legislature. I think, therefore, that the evidence of the Sub-Inspector was rightly admitted on this point. At the same time, I think that under ordinary circumstances the admission of the oral evidence of the statements made to the police when they are reduced to writing is not in keeping with the spirit of section 162, Criminal Procedure Code, and the existence of exceptional circumstances would be absolutely necessary to give any appreciable value to such evidence. In this case, for instance, Honnava's statement in question at the trial deserves to be credited, not simply because the Sub-Inspector says that she had made a statement to that effect to him, but mainly on the additional ground that though it was suggested in her cross-examination that she had made a contradictory statement before the committing Magistrate, it could not be suggested to her that her earlier statement to the police

(1) (1912) 35 Mad. 397. (2) (1907) 9 Bom. L. R. 366.

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on this point was in conflict with her present version, and that the Sessions Judge did not ask her any question on this point, though she was re-called on the 8th January, after the Sub-Inspector was examined and questions on other points, arising out of her statement reduced to writing before the police, were put to her by the Court.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914. *July* 28.

YELLAVA SAKREPPA BARKI (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIMAPPA GIREPPA DESAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Grant of land—Grant for Barki service—Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.

In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right.

SUIT in ejectment.

The plaintiff, an inamdar, owned certain Deshgat Vatan lands. Sometime before 1853, a predecessor of his granted them to defendant's brother for Barki services, which consisted in sweeping the floors and lighting the lamps of the plaintiff's family house.

In 1909, the plaintiff elected to discontinue the services and resume the lands. He sued the defendant in ejectment.

* Second Appeal No. 678 of 1913.