CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. EMPEROR *v.* FAKIRA APPAYA.*

September 23.

Practice—Charge to Jury—Misdirection—Omission to direct Jury on points telling in accused's favour—High Court—Interference—Statement made by accused before Committing Magistrate—Admissibility—Criminal Procedure Code (Act V of 1898), section 287—Indian Evidence Act (I of 1872), section 24—Person in authority—Police Patil arresting the accused.

The High Court will interfere in those cases where it is made to appear that the Sessions Judge has prejudiced the accused by omitting from his charge to the Jury points of capital importance telling in accused's favour.

The phrase "a person in authority" in section 24 of the Indian Evidence Act would include the Police Patil who arrests one of the persons accused of the offence.

Quære.—Whether the statement made by an accused before the Committing Magistrate is governed by section 287 of the Criminal Procedure Code or by section 24 of the Indian Evidence Act ?

THIS was an appeal from conviction and sentence passed by A. Montgomerie, Additional Sessions Judge of Belgaum.

The facts were that the accused was tried for having caused the death of one Yamnaya on the 5th February 1915. The deceased had a mistress named Ningawa (accused No. 1). She was arrested on the 12th, when she confessed that she had decoyed the deceased on the night in question to her house, where he was belaboured and killed by accused Nos. 3 and 4. Before the Committing Magistrate, the accused No. 2 made a statement admitting the part he had taken in beating the deceased.

When the accused were tried before the Court of Session, accused No. 2 retracted the statement that he

* Original Appeal No. 295 of 1915.

had made on the ground that it was made through inducement offered by one Annappa, the Police Patil. In the Police inquiry into the case Annappa had taken a part, by arresting accused No. 4.

The learned Sessions Judge allowed the statement made by accused No. 2 before the Committing Magistrate to go into evidence and summed up to the Jury the case against the accused No. 2 thus :—

Similarly, with regard to the statement made by accused No. 2 before the Magistrate he has told you that he was induced to make that statement by some obscure representation made to him by one Annappa Gauda Patil. Even if that be true, it would not invalidate that confession, because, I do not think that Annappa Gauda Patil, can be considered as in any way a person having authority within the meaning of section 24 of the Indian Evidence Act. It is not suggested that this confession was made at the instance of any police official in charge of the case. It is not clear what inducement was offered to the accused to make a statement, which, according to himself, he knew at the time to be false. You are asked to believe that to oblige a person who apparently was not on particularly intimate terms with him—in fact he was not on intimate terms at all with him—the accused voluntarily, after having been in magisterial custody for some time falsely accused himself of having committed a murder in the hopes of getting a pardon. Now, if he had not committed the murder, do you think it likely that he would involve himself in so serious a charge as murder? So there seems no reason in the world why at the bare request of a stranger he should falsely accuse himself of a crime for which he ran a risk of being hanged.

With regard to accused No. 2, the principal evidence against him consists of his own confession before the Committing Magistrate. I have already discussed with you the circumstances under which he is alleged to have been induced to make that confession. Before the Committing Magistrate he admits that he pointed out to the police a spot in the field of Hutch Balia. That part of his statement is corroborated by the police. I see no reason to doubt the testimony of the police officer as to the circumstances under which he went to Hutch Balia's field to make examination. According to the police officer and according to the Panchnama, he took with him the accused who pointed a spot in the field where some rubbish consisting mostly of jowari stalks was lying, and in that place were found two small patches of earth (one says it was the size of a palm, and the other of two palms) which apparently had been soaked and from which according to the police officer emitted "the smell of a dead body." Unfortunately, that earth was not

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forwarded for examination, no doubt owing to lack of technical knowledge on the part of the police officer. The fact remains, however, that accused No. 2 took the police to this spot and pointed out a place where the earth was smelling of some decaying organic matter.

Now, you will notice that there is a difference between that statement and the confession of Ningawa. Ningawa does not mention the part played by accused No. 2 and his brother ; she does not mention their names in her confession, but like accused No. 2 she attributes the principal part of the assault on Yemnaya to Appya and Ningwa. It may be of course that Ningawa was trying to shelter her own relatives ; it may be that the part played by them was of less importance ; that is for you to decide. As I said to you, accused No. 2's confession is in a way corroborated by the fact that scratches were actually found on his face when he was arrested. The only other evidence against him is that of Mahomed and says that he met all these accused on the night on which Yemnaya disappeared. He says that he saw accused Nos. 2 to 5, and Ningwa coming together ; he asked where they were going : Yella and Fakira (accused Nos. 3 and 2) said that they were going to Ningawa's house.

If you believe the confession of accused No. 2, you must convict him of murder.

The Jury returned a verdict of guilty against the accused and the Judge accepted the verdict and sentenced him to transportation for life.

The accused appealed to the High Court.

Nilkanth Atmaram, for the appellant :—The statement made by the accused was in the nature of a confession, and having been induced by Annappa was inadmissible in evidence under section 24 of the Indian Evidence Act. Annappa was a person in authority : see *Reg.* v *Navroji Dadabhai* ;[1] *Empress* v. *Rama Birapa*,[2] and *The Queen* v. *Mussumat Luchoo*.[3]

Besides the charge to the Jury is defective inasmuch as it fails to draw the attention of the Jury to points that tell in favour of the accused, *e.g.*, the long time that elapsed between the arrest of the accused and

[1] (1872) 9 Bom. H. C. R. 358. [2] (1878) 3 Bom. 12.
[3] (1873) 5 N.-W.-P. H. C. R. 86.

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his confession ; that there was no reason why the accused had not confessed soon after his arrest ; that the object of the confession was to get additional evidence against the accused No. 4 with whom Annappa was on hostile terms. Refers to *Emperor* v. *Malgowda*[1] ; *Reg.* v. *Fattechand Vastachand*[2] ; and *The Queen* v. *Nim Chand Mookerjee*[3].

S. S. Patkar, Government Pleader, for the Crown.—The statement made by the accused is admissible under section 287 of the Criminal Procedure Code. Further Annappa is not a person in authority, as he was not the Patil of the village where the offence had been committed.

As regards the charge to the Jury, the pleader for the accused must certainly have placed before the Jury every point in the case that told in favour of the accused. No prejudice to the accused be shown, if the Judge omitted to enumerate any of the points in his charge.

BATCHELOR, J. :—The appellant here was the 2nd accused before the Court of Session. Altogether there were five persons accused of the murder of one Yemnaya, and of these five the present appellant and another were convicted. The trial was held before a Jury and in the case of this appellant the Jury was unanimous against him.

The case for the prosecution was that one Ningawa, the first accused before the Sessions Court, was the mistress of the deceased man ; that she and several other villagers having a cause of ill-will against him, he was lured by her into her house on the 5th February last ; that there he was murdered by the accused ; that his dead body was carried away to a field about 1½ miles

(1) (1902) 27 Bom. 644. (2) (1868) 5 Bom. H. C. R. 85 (Cr. C.).
(3) (1873) 20 W. R. 41 (Cr. Rul.).

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distant, and was on a subsequent date removed to another spot in the site of a neighbouring village. The dead body was discovered in the morning of the 9th of February, and that night the woman Ningawa was arrested. The present appellant was arrested on the 10th of February. On the 12th of February, Ningawa made a confession before the First Class Magistrate, Mr. Patankar, in which she said that the murder had been committed by the accused No. 4 and his two sons. She did not name the present appellant as having taken part in the crime. After all the five accused had been arrested, the enquiry proceeded as usual before the Committing Magistrate, Mr. Maxwell, and before that Magistrate on the 19th March the present appellant made the statement, Exhibit 25. That statement is of a confessional character, and was subsequently repudiated in the Court of Session on the ground that it had been induced by promises held out to the appellant by one Annappa Gauda, who was the Police Patil of the village where the appellant lived and who had taken part in the investigation of this crime.

There can be no doubt upon the record, and indeed, neither side has attempted to question that the conviction of this appellant was based entirely upon his statement to Mr. Maxwell, Exhibit 25. The record does indeed contain one or two fragments of other evidence which might be pressed into the service of the prosecution by way of corroboration. But they are of such very minor importance that admittedly no conviction could be had upon them, even if they would by themselves amount to fair justification for the appellant's commitment for trial. I propose, therefore, to say no more in regard to these unimportant pieces of evidence, but to deal with the case as a conviction which must stand or fall with the appellant's statement to the Committing Magistrate.

The first point urged before us by Mr. Nilkanth, the learned pleader for the appellant, is that the appellant's statement, Exhibit 25, was a confession; that as such it fell within the provisions of section 24 of the Indian Evidence Act; and that in accordance with those provisions it was irrelevant in these criminal proceedings, inasmuch as it was caused by an inducement or promise having reference to the charge against the appellant proceeding from Annappagauda, who was a person in authority, and sufficient to give the appellant grounds which would appear to him reasonable for supposing that by making it he would gain some advantage in reference to the proceedings against him. The learned Government Pleader has met this argument by the contention that the statement, Exhibit 25, cannot be brought within the purview of section 24 of the Indian Evidence Act, but falls exclusively under section 287 of the Criminal Procedure Code. That section enacts that: "The examination of the accused duly recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as evidence." There is no question but that this particular statement embodies the examination of the accused before the Committing Magistrate, and that that examination was duly recorded by that Magistrate. It would seem, therefore, to follow under this section that the statement is necessarily receivable in evidence and that the Court is bound so to treat it. It is contended, with some plausibility, that the imperative provisions of section 287 of the Criminal Procedure Code cannot be displaced by reference to section 24 of the Indian Evidence Act, which should be read as referring only to confessions made outside the course of the regular proceedings in the inquiry and trial. The rival argument upon this point indicates that where the statement made by an accused before a Committing Magistrate is of a confessional

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character, there is at least, at first sight, some difficulty in reconciling the requirements of section 287 of the Criminal Procedure Code with those of section 24 of the Indian Evidence Act. The matter is not free from difficulty, and as, in my opinion, the appellant is entitled to succeed upon another and an independent point, I prefer to express no decided opinion upon the provisions of the sections of the two statutes, when read together, as bearing upon a statement of a confessional character made by an accused before a Committing Magistrate. I will, therefore, assume for the purposes of this case that the learned Government Pleader is right in his view that section 287 of the Criminal Procedure Code must govern this statement, and that in consequence the statement was properly receivable in evidence and laid before the Jury.

On this basis there remains the other argument of Mr. Nilkanth, that the verdict of the Jury ought to be set aside by reason of the learned Judge's misdirection regarding the truth of this statement, Exhibit 25. In the main, Mr. Nilkanth's argument has taken the form that the learned Judge omitted to direct the Jury upon certain capital points on this topic. And though in general the Court may be indisposed to interfere with the Judge's charge to the Jury on the ground of mere non-direction, as opposed to mis-direction, it is, I think, clear on the authorities that in certain cases no real distinction can be drawn between non-direction and mis-direction. Upon this subject it is useful to refer to what was said by Mr. Justice Markby in the case of *The Queen* v. *Nim Chand Mookerjee*,[1] where that learned Judge, after observing upon the effect of the different circumstances in which different charges have to be delivered, continues in these words: "When we are called upon to say whether or not the Judge has done his duty in

[1] (1873) 20 W. R. 41 at p. 42 (Cr .Rul.)

addressing the jury on the facts, we must look to his summing-up as a whole, and see that the case has been fairly laid before them." I entirely agree with this description of the Court's duty. In *Emperor* v. *Malgowda*,[1] a Bench of this Court, consisting of Sir Lawrence Jenkins and Mr. Justice Batty, set aside the verdict of the Jury on the ground that the Judge had omitted to call the Jury's attention to matters of prime importance which told in the accused's favour. And this decision was arrived at, notwithstanding that the matters telling in the accused's favour appear to have been discussed before the Court by the prisoner's advocate. In *Reg.* v. *Fattechand Vastachand*[2] Mr. Justice Sargent, as he then was, took the same view of the responsibilities of a Judge in summing up to the Jury. He says: "The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may, in his caprice, think proper to make to the Jury, but a 'proper' summing up, by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest." In another passage he observes: "I think, therefore, that the Judge committed an error in confining himself to so very brief a summary of the evidence, and in not giving a more careful analysis of that evidence." And after discussing the various omissions in the charge, the learned Judge concludes by saying: "It remains to consider whether the prisoners, or any of them, have been prejudiced by those omissions in the summing up." It is clear, therefore, that the authorities are in favour of our interference if it is made to appear that the Sessions Judge has prejudiced the accused by

[1] (1902) 27 Bom. 664. [2] (1868) 5 Bom. H. C. R. 85 at p. 94 (Cr. C.).

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omitting from his charge to the Jury points of capital importance telling in accused's favour. And, in my opinion, that is the case here. I have said that the whole case against this appellant depended exclusively upon his statement to Mr. Maxwell, Exhibit 25. The following is the passage in which the learned Sessions Judge discussed this Exhibit in his charge to the Jury:—

"With regard to the statement made by accused No. 2 before the Magistrate, he has told you that he was induced to make that statement by some obscure representation made to him by one Annappagouda Patil. Even if that be true, it would not invalidate that confession, because I do not think that Annappagouda Patil can be considered as in any way a person having authority within the meaning of section 24 of the Indian Evidence Act. It is not suggested that this confession was made at the instance of any police official in charge of the case. It is not clear what inducement was offered to the accused to make a statement, which, according to himself, he knew at the time to be false. You are asked to believe that to oblige a person who apparently was not on particularly intimate terms with him—in fact he was not on intimate terms with him— the accused voluntarily, after having been in Magisterial custody for sometime, falsely accused himself of having committed a murder in the hopes of getting a pardon. Now if he had not committed the murder, do you think it likely that he would involve himself in so serious a charge as murder ? So there seems no reason in the world why, at the bare request of a stranger, he should falsely accuse himself of a crime for which he ran a risk of being hanged."

That, no doubt, is a very telling presentation of one side of the case, and if it had been accompanied by an equally telling representation of the other side, I do not think that any valid objection could have been offered. But unfortunately as it seems to me, the numerous and weighty considerations on the other side were not brought to the Jury's attention, and I can well believe that on the charge as it was delivered to them, the Jury felt that they had no option but to believe that the statement, Exhibit 25, was true and that the evidence against accused No. 2 was convincing. Among the points which, as I think, the learned Sessions Judge should have invited the Jury to

consider with a view of estimating judicially the real value of this statement, Exhibit 25, I may notice, first, the circumstance that over a month had elapsed between the applicant's arrest and his making of this statement. It is true that this lapse of time is not altogether overlooked by the learned Judge. But whereas he uses it as an argument against the appellant, its real weight seems to me to tell on the other side. The true consideration upon this topic was, I think that more than a month had elapsed before the statement was made, and that up till the time of the making of the statement there was against this appellant no real or substantial evidence whatsoever, so that, assuming him to have been one of the murderers, there was no apparent occasion or reason why, consistently with the usual motives of human nature, he should, at this late date, have gone out of his way suddenly to convict himself of a crime of which no one else could have convicted him. Then, I think, the learned Judge was mistaken in telling the Jury that Annappagauda Patil was not a person in authority. The evidence shows that Annappagauda was Police Patil of the appellant's village, and that he had actually arrested one of the persons accused of this murder. In *Reg.* v. *Navroji Dadabhai*[1] Sir Charles Sargent in considering the meaning of the expression 'person in authority' says that: "The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would....be....sufficient to give him that authority." On the evidence recorded in this case I cannot doubt that Annappagauda Patil was a person in authority within the meaning of section 24 of the Indian Evidence Act.

Then another matter of primary consequence which should, I think, have been prominently brought to the Jury's attention in connection with this Exhibit 25 was the total omission of any reference to the appellant in

[1] (1872) 9 Bom. H. C. R. 358 at p. 369.

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the accused Ningawa's confession made so early as the 12th February. This omission was the more significant, because the case for the prosecution was that Ningawa who had decoyed the deceased to her house, and had there procured and superintended his murder, had no visible reason for omitting the name of the appellant if he had assisted her in this crime. Next, I think the learned Judge was also in error in leaving it to the Jury to decide whether Exhibit 25, treated by him as a confession, was admissible in evidence. For, if Exhibit 25 be treated in this way, then the question of its admissibility was for the Judge and not for the Jury : see section 298 of the Criminal Procedure Code and the case of *Reg.* v. *Navroji Dadabhai*[1] to which I have already referred.

Lastly, on the general merits, I would say that my own experience by no means confirms the learned Judge's view as to the conclusiveness of the argument that an Indian peasant could not possibly falsely accuse himself of murder for the mere sake of earning the good-will of his village Patil. It may be conceded that it is unlikely that he would do so ; but where many other considerations operate, as they do in this case, I think it was misleading to state this particular argument as if it was absolutely decisive. To put the case in this way is, in my judgment, to overstate it, and to allow less than due weight to the simplicity of an unlettered peasant and his liability to yield to the influence of his Patil. Here there is good ground for believing that the Patil was anxious to secure the conviction of accused No. 4, and it is upon accused No. 4 that the appellant's statement, Exhibit 25, casts the main responsibility for this crime.

On these grounds it appears to me that the learned Judge, whose pains and care in trying this case are

[1] (1872) 9 Bom. H. C. R. 358.

otherwise manifest throughout the record, did misdirect the Jury in his treatment of this Exhibit 25. I would, therefore, reverse the conviction and sentence and direct that the appellant be acquitted and discharged.

HAYWARD, J.:—I concur. These are the relevant facts. On the 5th of February, the 1st accused is alleged to have decoyed the deceased Yemnaya to her house where he was set upon and killed by certain other people who removed his body to a field outside the village. It is alleged that from that field the body was subsequently removed to a neighbouring field in the adjoining village. On the 9th of February, the first accused was arrested upon discovery of the body, and, on the 10th of February, the 2nd accused, who is the appellant here, was arrested upon suspicion and is said to have pointed out the field in which the body had originally been deposited. It is not alleged that it was his pointing this field which led to the discovery of the body in the field in the adjoining village. On the 11th of February, a witness, named Mahomed, was examined who said that he had seen the appellant going towards the house where the crime is alleged to have been committed upon the night of the crime. On the 12th of February, the 1st accused made a confession, but in that confession did not mention the name of the appellant, though she implicated the 4th accused and certain others. Nothing further appears to have transpired bearing upon the case of the appellant prior to the case being sent for inquiry to the Committing Magistrate, but, on the 19th of March, when the appellant was called upon to explain the evidence against him, he admitted his own guilt but more particularly implicated the 4th accused. That statement was recorded in the regular course of the proceedings before the Committing Magistrate. On the 4th of May, the appellant

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retracted this statement at his trial, and explained that he had made it under a promise of acquittal given by his village Police Patil. The case against the appellant, therefore, turned mainly upon the circumstances surrounding his admission in the Committing Magistrate's Court which was subsequently retracted in the Sessions Court.

Now it has been argued here on appeal that there was misdirection in submitting this admission for the consideration of the Jury. It has been urged that it was inadmissible, being a statement induced by the promise of acquittal held out to the appellant by a person in authority, viz., his village Police Patil. We have been referred to certain evidence bearing on this argument, viz., the evidence of the appellant's mother-in-law and of the witness Kalaya, which, no doubt, gives ground for the assertion now made on behalf of the appellant that his admission of guilt was with a view to implicate the 4th accused who was an enemy of the Police Patil. We have also been referred to the fact that the Police Patil was not only the Patil of the appellant's village, but had also himself arrested the 4th accused in connection with the inquiries made by the Police. If the appellant's admission had been a confession made before trial, it would, no doubt, have been incumbent upon us to consider and decide these facts. For they would, if true, indicate a promise given by the Police Patil of the appellant's village who was in the circumstances clearly a person in authority in regard to the charge against the appellant within the meaning of section 24 of the Indian Evidence Act. The determination of these facts would be within our province, as the relevancy of the confession would have been a matter for decision not by the Jury but by the Judge under the provisions of section 298 of the Criminal Procedure Code. The appellant's admission, however,

was not a confession recorded before trial, and it seems to me more than doubtful whether it is liable to the application of the rule laid down in section 24 of the Indian Evidence Act. It was not a confession recorded under section 164 of the Criminal Procedure Code, but in the course of the committal proceedings under sections 342 and 364; and it has been further expressly provided by these rules of procedure enacted after the Indian Evidence Act that statements of the accused recorded in the course of the committal proceedings shall be read in evidence before the Sessions Court, namely, by section 287 of the Criminal Procedure Code.

But there were, in this view of the case, these relevant facts bearing on the truth or otherwise of this admission for the consideration of the Jury. The first accused, who made a full confessional statement and would appear therefrom to have been cognizant of all the circumstances, never mentioned the name of the appellant though she specified in detail the names of the other persons concerned in the crime. The appellant did point out a field, but the mere pointing out of a field would not necessarily imply guilt as it does not appear that any definite discovery resulted from his action such as would necessarily implicate him in the crime. The witness, Mahomed, stated he had seen the appellant near the scene on the night of the offence but that again was not a circumstance which would necessarily implicate him in the conspiracy to kill the deceased. It was not until nearly 1½ months afterwards that the appellant without any apparent reason and without any further evidence having been procured against him made the admission of his guilt. It was remarkable that this admission particularly implicated another man, accused No. 4. These facts had an important bearing upon the explanation urged on behalf of the appellant that it was under promise of

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acquittal in consideration for the implication of accused No. 4, an enemy of appellant's village Police Patil, that he made a false admission of guilt before the Committing Magistrate. It is our duty, therefore, to satisfy ourselves whether these important facts were fairly laid before the Jury when the appellant's admission of guilt was submitted to their consideration by the learned Sessions Judge. It appears to me after a careful consideration of the whole charge that they were not and in that view no other conclusion is, in my opinion, possible than that there was a legal misdirection. For a charge should be "a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest" as stated by Sargent J. in the case of *Reg.* v. *Fattechand Vastachand.*[1] There was, therefore, in my opinion, a legal misdirection notwithstanding the evident care in the trial of the case exhibited by the learned Sessions Judge. There can, further, in my opinion, be no question that that misdirection did prejudice the appellant. For those important facts have raised grave doubts in my mind as to the truth of the appellant's admission and practically the only evidence against him was admission before the Committing Magistrate, an admission which was uncorroborated and had been retracted before the Sessions Court.

The conviction and sentence ought, therefore, in my opinion to be set aside and the appellant ought to be acquitted and discharged.

Accused acquitted.

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[1] (1868) 5 Bom. H. C. R. 85 at p. 94 (Cr. C.).