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the insolvent's estate. Immediately the creditor goes to the Official Assignee and asks for the moneys he is entitled to receive the same.

If the Official Assignee does not pay the dividend to the creditor, no suit can be filed against him, but the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it, and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application as provided by section 74 of the Presidency Towns Insolvency Act.

By this order I direct the public officer to pay the moneys to the decree-holder of the creditor instead of to the creditor.

K. MCI. K.

ORIGINAL CRIMINAL.

Before Mr. Justice Crump.

KING-EMPEROR *v.* SHAFI AHMED AND OTHERS *.

1925. May 18.

Evidence Act (I of 1872), sections 24, 25 and 26—Criminal Procedure Code (Act V of 1898), sections 164 and 533—Statement by accused to Magistrate in Native State—Practical repetition of previous incriminating statement made to police—Admissibility.

Where the statement of an accused person to a Magistrate amounted to a repetition, practically without comment, of a previous incriminating conversation between himself and a Police officer,

Held, that it was inadmissible in evidence by reason of section 25 of the Evidence Act (I of 1872).

Admissibility and mode of proof of statements made to Magistrates in Native States, considered.

Queen-Empress v. *Nagla Kala*[1], *Queen-Empress* v. *Sundar Singh*[2] and *Emperor* v. *Dhanka Amra*[3], referred to.

* Case No. 22 of 1925, Criminal Sessions.

(1) (1896) 22 Bom. 235. (2) (1890) 12 All. 595.

(3) (1914) 16 Bom. L. R. 261.

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THE accused, one A. G. Phanse, Adjutant-General of Indore State, was charged, along with a number of other persons, with conspiracy to kidnap one, Mumtaz Begum, out of British India and with certain other offences, including that of abetment of murder, alleged to have been committed in Bombay in pursuance, and as a probable consequence of such conspiracy. Some time after the commission of the said offences the accused had been sent to Bombay by the Indore State authorities at the request of the Commissioner of Police, Bombay, and had given certain explanations to the Police with reference to facts which appeared to involve him in the conspiracy above mentioned. On his return to Indore he was, on February 8, 1925, at the request of the Agent to the Governor-General in Central India, arrested by the Indore Police. The said request was made at the instance of the Chief Presidency Magistrate, Bombay, to whom the Bombay Police had made an application for the purposes of extradition. Thereafter, on February 9, 1925, the accused was brought before the City Magistrate, Indore, in accordance with the provisions of the Extradition Rules † of that State. Inspector Smith (C. I. D., Bombay) was also present. The material portion of the evidence of the Magistrate (who was

† The material rules in this connection were—

10. On the receipt of a prisoner, the Police will produce him within 24 hours before the nearest Magistrate together with the person at whose instance he was arrested.

11. When the accused is brought before him, the Magistrate shall immediately draw up a report which shall contain the following particulars :—

* * * * * *

(*f*) The deposition of the person at whose instance the accused was arrested.

(*g*) The deposition of any witnesses produced against the accused.

(*h*) A list of any property seized with the accused.

(*i*) Any explanation offered by the accused.

12. The provisions of section 346 of the Indore Code of Criminal Procedure shall apply to the recording of the statement of the accused under Rule 11.

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called as a witness at the trial) as to what happened when the accused was so brought before him, was as follows :—

"Accused No. 9 [sc Phansel...was placed before me in the course of extradition proceedings. I recorded Smith's statement first and then I asked the accused if he had any explanation to make and I then recorded what he said. He told me he wanted to make a long statement. I told him he was not bound to make one and that it might be used against him. He made the statement and I recorded the whole of it. The statement was recorded under the Extradition Rules. I had in mind the Extradition Rules and also section 153 of the Indore Criminal Procedure Code. The Extradition Rules say that the statement of the accused should be recorded in accordance with section 346 of the Indore Criminal Procedure Code*.....As far as I remember the accused and his pleader were present when the statement was taken in my chamber.

Cross-examined :—When I took down this statement accused No. 9 was under arrest..... I should not have recorded the statement had I any reason to believe that it was not voluntary.....I cannot say if the City Superintendent of Police was there for the whole time I was recording the explanation of the accused. He was there for part of the time.....Most of what accused No. 9 told me was the conversation between him and the Commissioner of Police, Bombay. I gathered from the statement that the accused was given a threat at Bombay. Nevertheless, I continued to record his statement."

The record of the statement made by the accused to the City Magistrate, which, though self-exculpatory in tone, contained admissions tending to be damaging when taken in conjunction with facts subsequently established by the prosecution, began as follows :—

Question :—You have been arrested at the instance of Inspector Smith of the Bombay C. I. D. on charges of abetment of murder and of abduction and conspiracy. Have you to offer any explanation ?

Answer :—In this connection I have to say that I was ordered to go to the Commissioner of Police, Bombay, by the Karbhari Saheb. Accordingly I started on February 3, 1925.....I immediately went to the Office of the

* Section 153 of the Indore Criminal Procedure Code corresponds with section 164 of the Criminal Procedure Code in force in British India.

Section 346 of the Indore Criminal Procedure Code corresponds with section 364 of the Criminal Procedure Code in force in British India (prior to the 1923 amendment).

[Ed.]

Commissioner of Police. He asked : "Are you Sardar Phanse"? I said : "Yes, Sir". He said : "Tell the truth about whatever I ask you ; if you do not tell the truth you will (have to suffer) the evil consequences thereof". I told him : "I shall tell the truth in respect of myself, I do not know in respect of others". He asked,.....&c.

On February 14, 1925, the accused was handed over to Inspector Smith of the Bombay C. I. D. and brought to Bombay where he was charged with the offences above mentioned, and duly committed for trial. In the course of the trial, which took place before Crump J. and a special jury, at the Criminal Sessions of the High Court, the prosecution tendered in evidence the statement of the accused to the City Magistrate. The defence objected.

Kanga (Advocate General) with *Kemp* for the Crown :—The statement in question is not a confession, and it is only when certain facts stated therein are considered in connection with other facts established by the prosecution that the whole becomes incriminating. Sections 24, 25 and 26 of the Evidence Act are, therefore, strictly inapplicable. But even if it is taken as a confession section 26 covers the case, as the statement was made in the immediate presence of a Magistrate. "Magistrate", as used in that section, includes a Magistrate of a Native State : cf. *Queen-Empress* v. *Nagla Kala*[1], *Queen-Empress* v. *Sundar Singh*[2] and *Emperor* v. *Dhanka Amra*[3]. Only two questions then can possibly arise, namely, as to method of recording, and as to voluntariness.

On the first point, the statement was recorded in compliance with the Indore Extradition Rules, under Rule 12 of which it is laid down that the provisions of section 346 of the Indore Criminal Procedure Code (the wording of which is practically identical with that of

[1] (1896) 22 Bom. 235. [2] (1890) 12 All. 595.
[3] (1914) 16 Bom. L. R. 261.

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section 364 of the Indian Criminal Procedure Code) should be regarded. The record of the statement, together with the note at the foot thereof, is in exact accordance with the provisions of that section. It is true that the Magistrate in his evidence has stated that he had also in mind the provisions of section 153 (corresponding with section 164 of the Indian Code, before the 1923 amendment) but there was in fact no need, under the rules, to pay any regard to the provisions of that section, and his meaning appeared to be simply that he concerned himself particularly with the voluntariness of the statement. Nor, quite apart from the extradition rules under which the Magistrate acted, is there any reason why the provisions of section 164 of the Indian Criminal Procedure Code should now be held applicable or relevant by this Court. That section only applies to statements recorded in the course of an investigation under Chapter XIV of the Act, and not to an investigation by the City of Bombay Police [vide section 1 (2) (*a*)] even though the words "any Presidency Magistrate" have been inserted by the recent amendment of section 164. See Mookerji J. in *Emperor* v. *Panchkowri Dutt*[1]. See also Jenkins C. J. in *Barindra Kumar Ghose* v. *Emperor*[2]. But even if section 164 does apply to an investigation by Bombay Police, it was not in the course of such investigation that this statement was made. The accused was at the time in the custody of the Indore Police, and only came into the charge of the Bombay Police thereafter.

Finally, on this point, even if the provisions of section 164 are in some way held applicable, the non-compliance therewith is cured by section 533, the Magistrate having been called and examined: cf. *Queen-Empress* v. *Raghu*[3].

(1) (1924) 52 Cal. 67.
(2) (1909) 37 Cal. 467 at pp. 494, 496.
(3) (1898) 23 Bom. 221.

As to the voluntariness of the statement, there is no presumption, as was suggested, against voluntariness: cf. *Reg.* v. *Balvant Pendharkar*[1], *Queen-Empress* v. *Basvanta*[2]. The order of the Magistrate in any event conclusively proves the voluntariness.

[Per Cur.—The real difficulty appears to me to be the form in which the statement was made. It was practically a repetition of what the accused stated to the Police. Does section 25 of the Evidence Act not rule that out?]

It is submitted not. In the first place, if read as a whole, the statement amounts to a confirmation of the truth of what the accused said he had stated to the Police.

But in any case, all that section 25 says is that no confession made to a Police officer shall be proved *as against* the accused. There is nothing to prevent the accused himself relying on, or using, such a statement. And having elected to do so (as he obviously did here when making his statement to the Magistrate) and having once made it admissible, he makes it admissible for all purposes. If, for example, in the Court of the committing Magistrate, when examined under section 210 of the Criminal Procedure Code, he had stated: "I said to the Police, &c.,....." that statement would have to be read to the jury in this Court as evidence under section 287, and the prosecution could of course make use of it.

Lastly, on this point, the reasons underlying the prohibition in section 25 must be considered. The reasons appear to be that the custody of a Police officer provides easy opportunities of coercion for extorting confessions, and further that the evidence of a Police officer is as a matter of policy not considered reliable for the purpose of proving confessions made to him.

(1) (1874) 11 Bom. H. C. 137. (2) (1900) 25 Bom. 168.

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But when the circumstances are such that neither of these reasons can apply, it cannot be necessary to extend the prohibition. Here, for example, the accused, so far from being subject to Police influence, actually complained that his real words to the Police in Bombay were not recorded. The statement really imports this,—"Whatever the Police may have taken down as my statement, what I really said was as follows :—"

Velinker, for certain of the other co-accused :—There is no doubt the statement amounts to a confession: See *Imperatrix* v. *Pandharinath*[1], and *Queen-Empress* v. *Javecharam*[2].

[The Advocate General intimated that he did not press this point, and referred to *Emperor* v. *Haji Sher Mahomed*[3].]

If so, it is clearly excluded by section 25 of the Evidence Act. See the remarks of Mahmood J., on this group of sections in *Queen-Empress* v. *Babu Lal*[4]. In any event it was not voluntary. *Queen-Empress* v. *Basvanta*[5] has been misread. Further, the Indore Magistrate did not follow the provisions of the section of the Indore Code corresponding with section 164 of the Criminal Procedure Code. The omission to do so was not due to mere inadvertance, and cannot therefore be cured by section 533. As a matter of fact section 533 expressly refers to defects under sections 164 and 364 only, and cannot therefore be called in aid to cure defects under the Indore Code.

If the recorded statement is inadmissible, the evidence of the Magistrate in proof of the oral statement is inadmissible: see Shah J. in *Emperor* v. *Maruti Santu*[6].

(1) (1881) 6 Bom. 34.
(2) (1894) 19 Bom. 363.
(3) (1921) 46 Bom. 961.
(4) (1884) 6 All. 509 at pp. 520, 531.
(5) (1900) 25 Bom. 168.
(6) (1919) 21 Bom. L. R. 1065.

Jinnah, with *Gupte*, for Phanse, accused No. 9:—It ought to have been obvious to the Magistrate that it was no use going further, as the statement he was recording was clearly made in Bombay under the influence of threats and coercion. See *Emperor* v. *Dinanath Sundarji*[1]. Apart from this, to allow it now to be proved would be to circumvent unjustifiably the provisions of section 25. The exception contained in section 26 is in no sense in the nature of a proviso to section 25. When a confession is made *to a Police officer*, and not when the accused is merely *in the custody of the Police*, there is no exception to its inadmissibility. Here it was made originally *to* the Police, and is, therefore, once and for all inadmissible. If, for example, the Magistrate had overheard it, he would not be allowed to give evidence of it,—and the present case stands on no different footing.

Kanga (Advocate General) in reply:—The judgment of Shah J. in *Emperor* v. *Maruti Santu*[2] has been disagreed with, and the dissenting judgment of Hayward J. agreed with, in *Pedda Obigadu* v. *King-Emperor*[3].

CRUMP, J.:—The Advocate General desires to tender as evidence the statement of accused No. 9 recorded at Indore by Mr. Mital on February 9, 1925.

The defence object on various grounds:—

A statement made by an accused person to a Magistrate may be inadmissible in evidence owing to some defect in the procedure followed in recording the statement. In the present case I do not feel myself pressed by any considerations of that nature.

It is abundantly clear that the Indore official who recorded this statement (Mr. Mital) was acting under

(1) (1920) 45 Bom. 1086. (2) (1919) 21 Bom. L. R. 1065.

(3) (1921) 45 Mad. 230.

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Rule 11 of the Indore Extradition Rules. For the purposes of that rule it was necessary for him to ask the accused if he had any explanation to offer on the facts upon which his extradition was sought. That explanation he was bound to record in accordance with the provisions of section 346 of the Code of Criminal Procedure in force in Indore. Mr. Mital did that which the law of Indore enjoined upon him.

Now as I understand the matter, Mr. Mital is not a Magistrate for the purposes of the Code of Criminal Procedure in force in British India. Therefore he was not bound to comply with the provisions of that Code. His failure to do so—assuming there be such failure—cannot by any conceivable process of reasoning render a statement made to him by an accused person inadmissible in evidence. Further any failure on his part to comply with the requirements of the law of the Indore State—assuming there be such failure—is a matter with which this Court is in no way concerned, for the plain reason that the law of the Indore State is not in force in British India. The statement recorded by Mr. Mital is in my opinion so far as procedure goes on no other footing than an extra judicial statement. If that is so the position is clear. Mr. Mital's evidence proves the statement. I wish to make it clear that I am dealing now with those objections which are based either on the Code of Criminal Procedure or on the Indore Criminal law. I am in no way considering the provisions of the Indian Evidence Act which are relevant first on the question of the proof of such a statement (sections 74 and 80) and secondly as affecting the admissibility of the contents of the statement.

In *Queen-Empress* v. *Nagla Kala*[1], this Court has held that the words "Police officer" and "Magistrate"

[1] (1896) 22 Bom. 235.

in section 26 of the Indian Evidence Act include the Police officers and Magistrates of Native States, and, following *Queen-Empress* v. *Sundar Singh*[1] that the word "Magistrate" in section 80 includes a "Magistrate" of a Native State. In *Emperor* v. *Dhanka Amra*[2] a Bench of this Court appears to have taken a contrary view so far as section 80 is concerned. In neither case has section 74 been considered. That in my opinion is the section applicable to the proof of such statements. Here, however, the Magistrate has been called and the question of proof does not arise. So far as concerns the interpretation of section 26 I am bound by this decision though I doubt its correctness, and it follows that section 25 would have to be similarly construed. But as regards the question of procedure it has never been held, nor do I think it could be held, that a Magistrate of a Native State is bound by the Code of Criminal Procedure, or that any failure by such Magistrate to follow the provisions of the local law could affect the admissibility of any record in a Court in British India.

But in any event I should have no difficulty in holding that, if any failure to comply with the provisions of the Code of Criminal Procedure could be urged in this case, that defect is cured by the evidence of the Magistrate and for this purpose I should rely on section 533 of that Code. If we treat Mr. Mital precisely as we should treat a Magistrate appointed under that Code—in my opinion an inadmissible line of argument—then his examination under section 533 of that Code shows that the accused has been in no way prejudiced by any formal defect.

Further I agree with the Advocate General that, apart from the grounds set out above, section 164 of the Code

(1) (1890) 12 All. 595. (2) (1914) 16 Bom. L. R. 261.

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of Criminal Procedure cannot have any application to the proceedings with which I am concerned. There was no "Investigation under Chapter XIV of that Code" and section 164 applies only to statements recorded in Investigations under that Chapter. Without assenting to the particular conclusion arrived at I would here cite the decision of Mukerji J. in *Emperor* v. *Panchkowri Dutt*[1], where that learned Judge holds that section 164 is on the same ground not applicable to certain confessions recorded by a Presidency Magistrate. It is impossible to hold that an Indore magistrate recording the explanation of an accused for the purpose of the Indore Extradition Rules is recording the statement of an accused person in the course of an investigation under Chapter XIV of the Code of Criminal Procedure.

I now turn to the provisions of the Indian Evidence Act. On the evidence I am satisfied that the statement was voluntary. Mr. Mital satisfied himself on this point and warned the accused that it might be used against him. The accused's pleader was present at the time. I cannot infer any threat or inducement merely from certain vague statements in the document itself. Even if those statements have any foundation the position was that the accused while complaining of the threats used to him deliberately made the statement. Section 24 of the Indian Evidence Act causes me no difficulty in this matter. The decision of this Court in *Queen-Empress* v. *Basvanta*[2], is in point here.

The difficulty which I feel—and it is a very serious difficulty—arises from section 25 of the same Act. That section runs as follows :—

"No confession made to a Police Officer shall be proved as against a person accused of any offence."

(1) (1924) 52 Cal. 67.

(2) (1900) 25 Bom. 168.

The prohibition is absolute and is not qualified by any succeeding section of the Act, except section 27 which does not apply here. This Court in a series of consistent rulings has declined to allow any incriminating statement made to a Police officer to be proved against an accused person even where such statement is on the face of it self-exculpatory. The leading case is *Imperatrix* v. *Pandharinath*[1] and it has been followed in many subsequent cases which I need not cite. The statement, with which I am now concerned, is self-exculpatory in tone, but contains admissions most damaging to the accused. Indeed I understood the Advocate General to concede that if this is a statement made to a Police officer it is excluded by section 25.

The sole point, therefore, which remains is this: Are the prosecution seeking to prove a statement made to a Police officer? In form it is a statement to an Indore Magistrate but what is it in substance? I have never yet in the course of my experience as a Criminal Judge seen a statement of this nature, and so far as I am aware no such statement has yet been judicially considered. But if it is read dispassionately from beginning to end it is not possible to escape this conclusion that the accused person is repeating, practically without comment, the conversation between himself and the Commissioner of Police, Bombay. It was suggested by the Advocate General in the stress of argument that there was nothing to show that any such conversation took place. But obviously were that so the whole story is necessarily false, for there is not one single independent allegation of fact from beginning to end. It is further clear that nowhere does the accused vouch for the correctness of the dialogue which he

[1] (1881) 6 Bom. 34.

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reports. He says no more than this "I humbly said to him (the Police Commissioner) that I would make a true statement". He does not say to the Magistrate "The story is a true story" neither does he say "The story is a false story". He says no more than this "Here is the story which I told to the Police Commissioner in Bombay".

The problem may be simplified. A is being tried for the murder of X. He says to a Magistrate "I told a Police officer that I killed X". Is that statement excluded by section 25 of the Indian Evidence Act? In form it is a statement to a Magistrate but in substance what is it? Had he said to the Magistrate, "I told a Police officer that I killed X and that was true", the matter would be different. The real meaning would be, "I told a Police officer that I killed X and that, viz., that I killed X, is true". This is in substance a confession to a Magistrate. But without any qualification the words "I told a Police officer that I killed X", remain a confession to a Police officer and nothing more. The question was discussed in argument whether, if an accused person himself made such a statement at his trial, the Court could use that statement. The answer clearly is that in such a case it would be difficult to hold that it was sought to be proved *against* the accused: and a further answer is that the words by themselves are wholly ambiguous, and would merely invite the further question: "Is what you told the Police officer true or is it false"? It is more relevant to point out that had the Magistrate himself heard the confession to a Police officer, he could not be permitted to prove it.

The point is no doubt a somewhat subtle one but the difficulty is real. I have read this statement many times and have weighed it in the light of the considerations I have set out above, and in my opinion to

permit it to go on the record would be to allow a confessional statement to a Police officer to be proved against an accused person. That the law forbids. To my mind the medium by which it is sought to prove such a statement does not alter the matter. The question is "To whom was the statement made"? The answer is that the statement was made to a Police officer. It was no doubt repeated to a Magistrate, but the mere repetition cannot render capable of proof a statement which as made the law excludes.

K. McI. K.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DEEKAPPA MALLAPPA HUBLI (ORIGINAL JUDGMENT-CREDITOR), APPELLANT *v.* CHANBASAPPA RACHAPPA NEELI AND OTHERS (No. 1 ORIGINAL JUDGMENT-DEBTOR AND DECREE-HOLDERS), RESPONDENTS*.

1925. *February* 13.

Decree—Execution—Civil Procedure Code (Act V of 1908), sections 63 and 73—Attachment before judgment—Order passed by Court at Dharwar—Certain of properties attached sold in execution of decrees obtained in Hubli Court of inferior jurisdiction—Sale proceeds deposited in Hubli Court—Application made to Dharwar Court for transfer of sale proceeds—Competency of Court to entertain application.

In a suit in the Court of the First Class Subordinate Judge of Dharwar, the appellant had obtained an attachment before judgment on certain properties of respondent No. 1 on July 12, 1922. This attachment was confirmed by the decree that was passed on January 23, 1923. Two other creditors of the respondent had obtained prior decrees against the respondent in the Court of the Second Class Subordinate Judge at Hubli. In execution of these decrees the judgment creditors got certain of the properties attached before judgment by the Dharwar Court sold in March and July 1923 and the sale proceeds were lying in the Hubli Court. The appellant made an application to the First Class Subordinate Judge at Dharwar that the sale proceeds should be sent for from the Hubli Court. The First Class Subordinate Judge directed the appellant to move the District Judge for transfer of the sale proceeds to his Court. The appellant having appealed to the High Court,

*First Appeal No. 344 of 1923.