of appeal has caused me some difficulty, but as far as I am aware there is no good reason why the scheme itself should not provide for an appeal, if it be considered desirable, and in any case the limitation of opportunities for litigation is not necessarily an evil.

Broomfield J.

For these reasons with the greatest deference to the Judges who decided the Madras cases, I am unable to agree that there is anything in section 92 to prevent the Court from framing schemes which contain within themselves complete machinery for carrying them into effect and modifying them as occasion demands. So far as this Presidency is concerned such schemes have always been regarded as perfectly legal. Several such schemes have received the sanction of the Privy Council, and though the question of their legality does not appear to have been directly raised the very fact that it has not been raised hitherto is an argument that the objections have no real substance. I agree that we should interfere in revision in this case and direct the District Judge to entertain the application and dispose of it according to law.

Order of lower Court reversed and case remanded.

B. G. R.

CRIMINAL APPELLATE.

Before the Honourable J. W. F. Beaumont, Chief Justice, and Mr. Justice Murphy.

EMPEROR *v.* ISSUF MOHAMED AND ANOTHER, ACCUSED.*

1930 *November* 27.

Criminal Procedure Code (Act V of 1898), section 162—Statement made by accused to Police—Negative user of the statement to contradict a second statement made by the accused in Court, is not permissible.

The accused, when arrested, gave a certain account of himself to the police officer which was recorded under section 162 of the Criminal Procedure Code. He gave a different account of himself in a statement made by him in the Magistrate's Court. To point out that the second statement was an after-thought the prosecution asked the police officer in evidence whether any such statement

*Criminal Appeal No. 473 of 1930.

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was made before the police when the accused was arrested and his statement was recorded. The witness answered in the negative. It being contended that this question and answer were inadmissible under section 162 of the Code :—

Held, that though the answer was in the negative form the statement before the police was still being used to show that it omitted something material and such a user of the statement was not permissible under section 162 of the Criminal Procedure Code, 1898.

CRIMINAL Appeal against the conviction and sentence passed by D. V Yennemaddi, Sessions Judge, at Surat.

The story of the prosecution was that the complainant Bai Bhanki, a married woman, was raped by the two accused in a creek at the back of the house where she worked. Each of the accused, when arrested, made a statement to the police officer as to what he was doing at or about the time of the alleged offence, which statement was recorded in writing. Accused No. 1 stated before the Committing Magistrate as follows :

" I had impounded the cattle of Girjashankar some five or six months ago. One Batilal, a private practitioner, had professional jealousy against my father. These persons have conspired and made this false case against me. On the day previous to the alleged offence, I had fallen from the bicycle and I had been injured on my knees."

The statement of accused No. 2 before the Committing Magistrate was as under :

" I was doing the mason work at Mahomed Ebrahim Hafez. At 12-30 when the work stopped, I went to Machhiwad for bringing fishes. I did not get fish and I was going to my house via Machhiwad. I met Bhanki near the end of Bazar. She was drunk. She called me and demanded eight annas from me saying she wanted for drinking liquor. I said I had no money. She pressed me much for money but I did not give and I went away home. I know nothing about this offence."

Both these statements were adhered to before the Sessions Judge.

In the trial before the Sessions Judge witness Sitaram, Police Head Constable, in answer to questions put to him, stated as follows :

" When accused No. 1 was arrested his statement was recorded. The accused did not tell me that he had a fall from a bicycle on the day previous to the alleged offence. He did not tell me that he was in his house. He did not tell me that he had impounded cattle of Girjashankar and Ratilal was his father's rival."

Witness Fatesing, Sub-Inspector of Police, was asked the following questions :—

Q.—Did accused No. 2 tell you that he was working as a mason at Mahomed Ibrahim's house and he went to Machhiwad to buy fish when the work was stopped at 12-30?

A.—" No."

Q.—Did accused No. 2 tell you that when he was returning to his house via Machhiwad, he met Bhanki near the Bazar and that she demanded 8 annas from him and he declined to give her the money?

A.—" No."

Objections to these questions and answers were taken on behalf of the accused but the same were overruled. Both the accused were convicted under sections 376 and 376 read with section 114 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for $2\frac{1}{2}$ years.

The accused appealed to the High Court.

H. M. Chokshi, for the accused.

P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT, C. J. :—This is an appeal from a conviction and sentence passed by the Sessions Judge of Surat. The accused were charged with the offence of rape under section 376 and section 376 read with section 114 of the Indian Penal Code. The case was tried by a jury, and the jury after the absence of an hour returned a verdict of guilty, unanimous as regards accused No. 2, and by a majority of four to one as regards accused No. 1. That being so, we can only interfere with the verdict of the jury on a point of law.

Now, the story shortly of the complainant was that she was raped by the two accused, who are boys of seventeen years of age, in a creek at the back of the house where she worked. The story had some curious features about it, because the medical evidence was that the complainant's body showed no marks of violence, though the alleged offence took place on stony ground, and no attempt seems to have been made by the complainant

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to summon help though there were various people in the immediate vicinity, if not actually looking on, at any rate within ear shot. It was suggested on behalf of the accused by their counsel that the learned Judge did not emphasise these facts in his summing up. I think the summing up was quite a fair and proper summing up and I should not have been inclined to interfere with the verdict on that account.

Various points of law were suggested, but, in my opinion, there is substance in only one of them, and that is a point which raises a question under section 162 of the Criminal Procedure Code. Each of the accused made statements in the Committing Magistrate's Court. The effect of the statements was that although they were at the place of the offence on the day in question they had not had sexual intercourse with the complainant, and accused No. 1 accounts for the fact that he had scratches on his knees by saying

"On the day previous to the day of the alleged offence, I had fallen down from the cycle and I had been injured on my knees."

And accused No. 2 says

"I met Bhanki (the complainant), near the end of Bazar, she was drunk. She called me and demanded eight annas from me saying she wanted for drinking liquor. I said I had no money. She pressed me much for money, but I did not give and I went away home. I know nothing about this offence."

Now, when one of the prosecution witnesses, Sitaram, who was the police head-constable, was being examined, he stated in his examination-in-chief that he recorded in writing a statement which accused No. 1 made when he was arrested. He was then asked certain questions in a negative form. They were questions relating to the contents of the statement of accused No. 1 which the witness had admitted recording in writing, and he says in his evidence—

"The accused did not tell me that he had a fall from a bicycle on the day previous to the alleged offence. He did not tell me that he was in his house. He did not tell me that he had impounded the cattle of Jinia Shankar and that Ratilal was his father's rival",

all matters which the accused had stated in the statement which he made before the Committing Magistrate. Now, the effect of that evidence obviously was to suggest to the jury that the statement which the accused had made in the Committing Magistrate's Court, and which he repeated in the Sessions Court, was an after-thought, because it was not the statement which he had made on his arrest.

In the case of accused No. 2, the same thing occurred in the evidence of witness Exhibit 31, Fatesing, who is the Sub-Inspector of Police. He was asked in his examination-in-chief

"Did accused No. 2 tell you that when he was returning to his house via Machhiwad he met Bhanki drunk near the Bazar and that she demanded eight annas from him and he declined to give her the money?"

and the answer is "No."

Then, in cross-examination he says:—

"As soon as accused No. 2 appeared before me his body was searched and then his statement was recorded."

Now, both those statements by the police were objected to by the pleader on behalf of the accused, but the objection was overruled. It seems to me that if the objection was put in the proper form—as I should assume that it was—it ought to have been allowed. The witness had admitted that he had written down the statement of the accused, and when he was asked as to whether the statement contained certain things, i.e., whether the accused had told him certain things, I think, in substance, he was being asked as to the contents of the document which contained the statement, and an objection, therefore, could have been taken that he was not at liberty to speak as to the contents of the document without producing the document, and the defence could have called for the production of the document before the witness was allowed to speak as to its contents, under section 22 of the Indian Evidence Act. But the difficulty would then have arisen that the statement was made to the police

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and could not be produced because of section 162 of the Criminal Procedure Code. That section provides :—

" (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

The provisions which follow, in my opinion, do not apply because the accused did not want the statement while the police witnesses were in the witness-box for the purpose of cross-examining those witnesses. The learned Government Pleader says that the questions directed to the police-officers were not as to the contents of the recorded statements, since the answers were negative. But it seems to me that that argument cannot prevail. If a police witness is asked " Did the accused say so and so," and he answers " Yes," he is clearly using the statement. If he answers " No," he is still using the statement to show that it omitted something material. Section 162 was intended to prevent the user of statements made by the accused to the police, and questions designed to show, by process of elimination, that matters subsequently mentioned by the accused were omitted from such statements are within the mischief aimed at by the section. In my opinion, in the case of both the accused those questions to the police-officers ought to have been disallowed.

Assuming that to be so, the learned Government Pleader submits that the fact of allowing those questions did not really affect the verdict of the jury, and that both under section 537 of the Criminal Procedure Code and under section 167 of the Indian Evidence Act we are not bound to set aside the verdict or direct a new trial if we are satisfied that the effect of the evidence was not seriously to prejudice the accused. There is,

no doubt, force in that contention. It is very difficult to say what effect any particular evidence may have had on the jury. But having regard to the fact that this is a case which was rather near the line, the jury evidently felt a difficulty about it because they took an hour in considering their verdict, I think it would be unsafe to say that the effect of improperly letting in evidence which in substance went to show that the statements of the accused before the jury were an afterthought had no effect on the minds of the jury. I think, therefore, we must set aside the verdict.

The question then arises whether there should be new trial. These accused are both young and they have been in prison for four months. On the whole, we think, the best course is to set aside the conviction and sentence and not direct a new trial, but direct the accused to be released.

MURPHY, J. :—I agree. There is no doubt that the statements, which are objected to by the defence in this case, made during examination of two of the police-officers, were inadmissible under section 162 of the Criminal Procedure Code. The difficulty was got over by asking the police-officers whether the accused in each case had made some definite statements, those being their explanations before the Committing Magistrate of the false charge, they said, had been made against them. This was an indirect way of discrediting the statements of the accused by saying that the substance of their statement had not been their earlier explanation of the charge against them. This was not proper, and such a use of statements recorded under section 162 of the Criminal Procedure Code cannot be made.

Conviction and sentence set aside.

J. G. R.