APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

1934
August 27

EMPEROR *v.* HARMAN KISHA (ACCUSED).*

Indian Evidence Act (I of 1872), section 25—Confession—Admissibility—First information contained in a statement by accused to Police officer—Criminal Procedure Code (Act V of 1898), section 154.

Section 25 of the Indian Evidence Act seems to be founded on the view of the Legislature that confessions made to a Police officer are suspect, since they may have been induced by improper pressure. If that be the true underlying principle of section 25, it is very difficult to see how any part of the confessional statement can be admitted in evidence.

Where the first information about an offence of murder was given by an accused person to a Police officer and that information admitted his own guilt,

Held, that the first information amounted to a confession within the meaning of section 25 of the Indian Evidence Act and, therefore, it could not be proved against the accused.

Where the lower Court held that so much of the confession as admitted the guilt of the accused should be excluded, but a portion of the confession which did not admit his guilt could be proved,

Held, further, that the whole of the confession must be excluded from the evidence:

Legal Remembrancer v. *Lalit Mohan Singh Roy*,[1] distinguished and doubted.

Queen-Empress v. *Babu Lal*,[2] referred to.

CONFIRMATION CASE No. 24 of 1934 (with Criminal Appeal No. 381 of 1934) from an order of conviction and sentence passed by D. V. Vyas, Sessions Judge, Nadiad, in Sessions Case No. 42 of 1934.

Admissibility of confession.

The prosecution alleged that Harman Kisha (accused) was sleeping with his wife, Ganga, on the night of February 25, 1934. He had a quarrel with her because she refused to have sexual intercourse with him and he beat her to death with a *dharia*. He then left the house, in which the only other occupant was his old mother and went to his elder brother Fulabhai and told him what he had done. He then

*Confirmation case No. 24 of 1934 (with Criminal Appeal No. 381 of 1934).

[1] (1921) 49 Cal. 167.

[2] (1884) 6 All. 509, F. B.

proceeded to the Police Sub-Inspector of Dakor about seven miles away and arrived there at 6 o'clock in the morning of February 26, and he there made a statement (exhibit 16) which ran as follows :—

"I, Harman Kisha, Patidar by caste, age 20, occupation Agriculture, residence Manjipura, appear in person and state that we four—I, my wife Bai Ganga, my mother Bai Kasan and my younger brother Kashi live in my house. Early last evening my brother Kashi had gone to the field for night watch. My wife, my mother and I were in the house. Last night I was sleeping in the *parshal* of my house. I again say that I was not sleeping in the *parshal* but in the *raveshi* and my wife was sleeping in the *parshal* and my mother was sleeping outside in the *osri* near me. At about 11 or 11-30 p.m. I got up and went to sleep with my wife. She did not allow me to sleep, and said to me "go and sleep with your mother". Thereupon I took her in the *orda* from the *parshal* and tried to have sexual intercourse with her, but she did not allow me to do so, and caught hold of my testicles. So I at once got enraged. (I took up the *dharia* lying near the *majus* in the *orãa* and struck her with it on her nape. Then I gave two three *dharia* blows on her head, whereby she has died). My wife has a child about 12 months old. That child was crying while lying in the craddle. After taking out and handing over the child to my mother, I have come to you. (I have killed my wife with this *dharia* and produce it)".

The accused was subsequently charged with an offence of murder of his wife under section 302 of the Indian Penal Code.

The trial ended in the conviction of the accused who was sentenced, subject to confirmation of the sentence by the High Court, to be hanged by his neck until he was dead.

The accused appealed.

Carden Noad, with *U. L. Shah*, for the accused.

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

BEAUMONT C. J. This is an appeal by the accused against his conviction for murder by the Sessions Judge of Kaira, and against the sentence of death passed upon him, and there is an application to confirm the death sentence.

The case for the prosecution is this : The accused was sleeping with his wife on the night in question. He had a quarrel with her because she refused to have sexual intercourse with him, and he beat her to death with a *dharia*. He then left the house, in which the only other occupant was his old mother, and went to his elder brother Fulabhai and

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told him what he had done. He then proceeded to the Police Sub-Inspector of Dakore about seven miles away, and arrived there at six o'clock in the morning and he there made a statement, which is exhibit 16, stating the facts in accordance with the prosecution case. Fulabhai, accused's brother, reported the matter to the Police Patel and subsequently made a statement before a Magistrate under section 164 of the Criminal Procedure Code stating what the accused had told him and that he himself had reported the matter to the Police Patel. Now if that case is proved there can be no possible doubt about the guilt of the accused, but the question is whether it is proved.

So far as Fulabhai is concerned, he gave evidence before the learned Sessions Judge, and his evidence was entirely contradictory to what he had stated before the Magistrate. His evidence in the Sessions Court was that on the morning of the offence he heard that his brother was crying, that he went to the brother's (accused's) house, that he found his wife lying dead on the ground and a blood-stained *dharia* lying near by, and that the accused said that his wife had been killed by somebody. The statement made by the witness under section 164 of the Criminal Procedure Code was of course used for the purpose of cross-examining him and discrediting his evidence in the Sessions Court, and one can feel no doubt whatever that the witness's evidence in the Sessions Court was untrue. But the fact that the evidence was untrue does not establish the truth of his earlier statement, and it is clear that the statement made under section 164, Criminal Procedure Code, is not substantive evidence. The learned Sessions Judge appreciated that point and treated the evidence of Fulabhai as practically of no consequence.

Then we come to the statement made by the accused himself to the Police Sub-Inspector, which is exhibit 16. The prosecution rely on that as the first information given under section 154 of the Criminal Procedure Code. But the

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first information requires to be proved, and the difficulty of proving this particular information arises from section 25 of the Indian Evidence Act. That section provides—

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

The Government Pleader suggests that "confession" in that section only refers to a confession made in the course of the inquiry into an offence and does not cover the first information which starts the inquiry. But I can see no justification in the wording of the section for any such distinction. If the first information is given by the accused to a police-officer and that information admits his own guilt, it seems to me to be a confession, which section 25 of the Indian Evidence Act does not allow to be proved. The learned Sessions Judge also took that view, but he got out of the difficulty in this way. He said that so much of exhibit 16 as admits the guilt of the accused must be excluded, but there is a good deal in exhibit 16 which does not admit guilt and which can be proved. He said that taking that part alone you have got evidence that the accused was in the house with his wife on the night in question, and that he had a quarrel with her, and taking these facts in conjunction with the fact that no other person's name was suggested as the perpetrator of the crime and that the *dharia* which the accused handed over to the police and the clothes he was wearing were stained with human blood, there was sufficient evidence to justify the conviction. The learned Sessions Judge in admitting part of exhibit 16 relies on the decision of the Calcutta High Court in *Legal Remembrancer* v. *Lalit Mohan Singh Roy.*[1] In that case also the accused had murdered his wife and the information which he gave to the police contained a statement as to the relations which existed between himself and his wife before the date of the offence and then a confession of the murder, and the learned Judges held that so much of the first information as spoke of events

[1](1921) 49 Cal. 167.

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prior to the night of the occurrence was admissible in evidence. That case is distinguishable from the present one because here the whole confession deals only with the events occurring on the night of the offence. But I doubt myself whether the principle on which the Calcutta High Court proceeded in that case can be justified. Section 25 of the Indian Evidence Act seems to be founded on the view of the legislature that confessions made to a police-officer are suspect, since they may have been induced by improper pressure. (See the judgment of Mahmood J. in *Queen-Empress* v. *Babu Lal.*[1]) If that be the true underlying principle of section 25, it is, to my mind, very difficult to see how any part of the confessional statement can be admitted in evidence. Taking the present confession and reducing it to its simplest components it comes to this: "I was sleeping with my wife on the night in question; I quarrelled with her; and I killed her." That is to say, the confession shows opportunity for the offence, motive for the offence, and commission of the offence, and it seems to me impossible to say that the portion of it which deals with opportunity, or the portion of it which deals with motive, can be treated as no part of the confession. If the confession is suspect as having been induced by improper means, it is obvious that the whole confession may have been so induced, and that the truth may be that the accused was never in the house at all. Therefore, in my opinion, we must exclude from the evidence the whole of exhibit 16. If that is so, we are left with nothing but this, that the body of the accused's wife was found in his hut in the early morning, that she had obviously been murdered with a *dharia* or some similar weapon, that the accused handed over to the police a *dharia* stained with human blood and that the clothes he was wearing were also stained with human blood. In his statement to the Sessions Court he explains these facts by saying that when he came back from his field he found his wife murdered, that he took

[1] (1884) 6 All. 509 at p. 523, F. B.

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the *dharia* which was lying beside her and got blood-stains on his clothes in attending to her body. If one excludes the confessional statement, it seems to me obvious that the evidence which remains is not sufficient to justify conviction. The police did not even prove that the *dharia* which was found in the hut belonged to the accused. They took no steps to get a confession of the accused recorded before a Magistrate, and they produced no evidence, apart from the confession, that the accused was in the hut with his wife on the night in question. That being so, in my opinion, the admissible evidence in this case is wholly insufficient to justify conviction.

The appeal must, therefore, be allowed.

SEN J. I agree.

Appeal allowed.

Y. V. D.

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FULL BENCH.

Before Sir John Beaumont, Chief Justice, Mr. Justice Rangnekar and Mr. Justice Divatia.

RAMCHANDRA BABAJI GORE (ORIGINAL ACCUSED), APPLICANT v. EMPEROR.*

1934 *September 16*

Criminal Procedure Code (Act V of 1898), sections 209 and 437—Case exclusively triable by a Court of Sessions—Discharge of accused—Magistrate may consider evidence, both its nature and credibility—"Sufficient ground", meaning of—Sessions Judge can set aside the order of discharge if he thinks that the order is illegal, incorrect or otherwise improper—"Improperly discharged" explained.

Under section 209 of the Criminal Procedure Code, 1898, a Magistrate must consider the evidence. He must satisfy himself that there are sufficient grounds for committing the accused person for trial and to do that he must consider the evidence, both its nature and credibility, but he has not to satisfy himself that there is a proper case for convicting the accused. If a Magistrate comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial and ought not to discharge the accused merely because he thinks that if he were to try the case himself, he would not be prepared to convict the accused on

*Criminal Revision Application No. 302 of 1934.