1874.
August 13.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* KÁLU PATIL and another.

Indian Evidence Act I. of 1872 Sec. 30—*Confession*—"*Jointly tried*"—*Discrepancies in evidence.*

A prisoner who pleads guilty at the trial, and is thereupon convicted and sentenced, cannot be said to be jointly tried with the other prisoners committed on the same charge, who plead not guilty. Where, therefore, one of eight prisoners before the committing Magistrate made a confession affecting himself and five others, and afterwards, at the trial before the Assistant Session Judge, pleaded guilty, and was thereupon convicted and sentenced, and the Judge then proceeded to take his evidence on solemn affirmation, and recorded his confession as evidence in the case against the other prisoners: *Held* that the Judge was wrong in taking the confession into consideration against those prisoners who pleaded not guilty. The proper course for the Judge was either to have sentenced the prisoner who pleaded guilty, and then put him aside, or to have waited to see what the evidence would disclose.

Discrepancies are not less infirmative of testimony, because a greater sagacity on the part of witnesses would have avoided them.

THE prisoner, Kálu Patel, and seven others were tried by W. H. Crowe, Assistant Session Judge at Tanna, on a charge of dacoity, under Section 395 of the Indian Penal Code. One of the prisoners, Nausiá, who had made a confession before the committing Magistrate, affecting himself and five other of the prisoners, pleaded guilty, and was accordingly convicted and sentenced to suffer rigorous imprisonment for four years. After Nausiá had been convicted on his own plea of guilty, and sentenced to punishment, he was still kept with the other prisoners till the conclusion of the trial, but the Assistant Session Judge examined him as a witness for the prosecution, and recorded his confession as evidence in the case. On that confession, with the other evidence in the case, the Assistant Session Judge convicted the five prisoners, whom the confession affected, and acquitted the remaining two, who were not affected by it. The Assistant Session Judge's reasons appear from the following extract from his findings:—

"The point for determination is whether the five accused persons, or any of them, did commit the dacoity in question. My finding is that the five accused persons did commit dacoity.

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"The evidence in this case consists of the depositions of witnesses Nos. 1, 2, and 3, and the admission made by one of the accused, Nausiá, who was convicted on his own plea of guilty, before the Magistrate (No. 7). The three witnesses (Nos. 1, 2, and 3) are unanimous in saying that one and all of the accused were present at the dacoity, which took place at the house of Vithu, (No. 1) in the month of Jyesht last. One only of the witnesses, Káshirám Teli (No. 2), states that he knew all the prisoners before the time of the robbery, and this is admitted by some of them in their examination. This witness states that he knew the accused 7 or 8 years before the robbery, and he is confident that the accused are the persons who committed it. I see no reason for doubting the veracity of this witness. I can see no possible motive he can have for falsely accusing eight men of a grave crime of this nature. There is another important piece of evidence in the case, namely, the confession of the accused Nausiá before the committing Magistrate, which affects all the present accused, and may, by Section 30 of the Evidence Act, be taken into consideration against them. This man Nausiá fully admits his guilt, and states clearly that all of the accused were with him except Muniá (No. 2) and Mahádu (No. 4). This statement corroborates that of the other witnesses as regards all of the present accused, and, as such, is entitled to consideration. From the whole of the evidence I consider the offence fully proved against the prisoners. I do not place much reliance on the evidence of witnesses Nos. 1 and 3, as I consider it improbable that they would be able from one interview, a year ago, to remember distinctly the faces of eight persons so as to identify them. The statement of Káshirám (No. 2), however, is not open to any such objection."

Two of the five prisoners, Káliá and Janiá, appealed to the High Court against the conviction and sentence passed by the Assistant Session Judge. The appeal was argued before WEST and NÁNÁBHAI HARIDÁS, JJ., on the 13th August 1874.

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Vishnu Ghanasham for the prisoners:—When the Assistant Session Judge recorded Nausia's confession as evidence against the other prisoners, Nausiá was not on his trial jointly with them, as required by Section 30 of the Evidence Act. His trial was then at an end, as he had been convicted, and sentence had been passed on him. The confession, therefore, was no evidence against the other prisoners. The learned pleader then commented at length on the discrepancies in the evidence.

Dhirajlal Mathuradas (Government Pleader) in support of the conviction:—According to the interpretation of the word "trial" in the Criminal Procedure Code, whatever takes place subsequent to the reading of the charge, is part of the trial. As a matter of fact, Nausiá was with the other prisoners when his confession was admitted as evidence against them. As regards the discrepancies, their existence shows that the witnesses were not tutored. Besides, they gave their evidence one year after the occurrence of the offence.

PER CURIAM:—We are of opinion that the examination of Nausiá was wrongly admitted as evidence in this case. After Nausiá had pleaded guilty, and had been convicted and sentenced to punishment, and his evidence had then been taken on solemn affirmation as a witness, he could not any longer be considered as one jointly tried with the others, when the Assistant Judge, in framing his judgment, took his evidence into consideration. On Nausiá's pleading guilty, he should have been sentenced and put aside, or the Assistant Judge, without immediately passing sentence, ought to have waited to see what the evidence disclosed. The course adopted by the Assistant Judge of keeping him as a prisoner with the rest, with the object of taking his statement into consideration under Section 30 of the Evidence Act, cannot be approved. Rejecting that piece of evidence what is left is the evidence of three witnesses, Vithu, Kàshirám, and Dharmá. It seems to be an improbable circumstance that these persons should not have promptly denounced the prisoners. Vithu knew Hari, one of the prisoners, and Káshi-

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rám knew all of them. This omission on the part of the witnesses throws a doubt on their credibility. Then there are the discrepancies which Mr. Vishnu Ghanashám has pointed out to us as to the identity of the prisoners, the place where the stolen money was handed over, and other matters which should also be taken into consideration. No doubt, it may be contended, that if these witnesses were tutored ones, care would have been taken to see that they should tell the same story. But care is not always taken, or effectually taken, in such cases, and discrepancies are not less infirmative of testimony, because a greater sagacity on the part of the witnesses would have avoided them. In the face of those which occur in this case, it would not be safe to convict the prisoners, and we accordingly direct that the convictions and sentences be reversed.

Conviction and sentence reversed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 363 *of* 1872.

August 17.

VASUDEV MORESHVAR GUNPULE.....*Appellant.*

RAMA BABAJI DANGE.....*Respondent.*

Registration Act XX. of 1866-*Consideration-Optional registration.*

The consideration mentioned in a deed of sale by the parties thereto must be regarded as showing the value of the interest conveyed for the purposes of registration under Act XX. of 1866. *Rohinee Debia* v. *Shib Chunder Chaterjee* (15 Calc. W. R. Civ. Rul. 558) followed.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Ratnágiri, affirming the decree of Gopál Amrit, Subordinate Judge at Chiplun.

The plaintiff, Vásudev Moreshvar, brought this suit to recover possession of a shop with the ground underneath it, and based his claim to the property on a deed of sale executed to him by one Govind Pándurang Sett, under date the 24th November 1869. The deed recited that the property in dispute had been mortgaged to the said Govind Pándurang for Rs. 118-12-0, and that the mortgagee sold his rights