Before Mr. Justice Prinsep and Mr. Justice Stephen.

EMPEROR

v.

NURI SHEIKH.*

1902
Jan. 31.

Witnesses, statements of—Police investigation—Power of Magistrate to record statements not voluntarily made—Duty of police when fear of witnesses being gained over—Magistrates, Bench of—Powers of member to act independently—Murder—Suspicion—Criminal Procedure Code (Act V of 1898) ss. 15, 16, 162, 164, and 307—Penal Code (Act XLV of 1860) s. 302.

The accused was suspected of having killed his wife. The police officer investigating the case sent him to the Subdivisional Magistrate, who, considering the case as one of suspicion only, released the accused on bail. After the *post-mortem* the investigation was renewed, and three days after the release of the accused the police officer sent a number of witnesses to an Honorary Magistrate, not having jurisdiction to try the case, to have their statements recorded under s. 164 of the Criminal Procedure Code on the ground that there was every chance of their being gained over. Their statements, as also that of the accused, were recorded by that Magistrate.

Held, that the police officer had no authority to place the witnesses before the Honorary Magistrate, as they did not appear voluntarily.

Held, also, that the Honorary Magistrate being a member of an independent Bench exercising third-class powers could not, unless he was specially authorized, act independently, that is to say, when not sitting on the Bench.

Held, further, that the object of s. 162 of the Criminal Procedure Code would be defeated if, while a police officer cannot himself record any statement made to him by a person under examination, he can do so by causing the persons to appear before a local Magistrate not competent to deal with the case and to get their statements recorded by him. If the police officer had reasons to believe that the witnesses were likely to be gained over by the accused or his party, the police officer should have sent in the accused and the witnesses to the Magistrate having jurisdiction without delay.

In this case the accused Nuri Sheikh and his younger wife, the deceased Safina Bibi, slept alone in his *bari* on the night of the 16th August 1901.

The next morning the villagers became aware that she was dead. Suspicion was aroused, and the chaukidar gave informa-

* Criminal Reference No. 39 of 1901, made by B. V. Nicholl, Esq., Sessions Judge of Mymensingh, dated the 17th of December 1901.

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tion at the police-station. Shortly afterwards the Sub-Inspector arrived, and after having examined a number of witnesses sent the accused to the Subdivisional Magistrate at Jamalpore, who on the 19th August released the accused on bail, there being in his opinion nothing but mere suspicion against him. At the *post-mortem* examination of the body, it was found that the deceased woman had died from strangulation. The police then renewed the investigation, and on the 22nd August the Sub-Inspector sent seven witnesses to a local Honorary Magistrate not having jurisdiction for examination under s. 164 of the Criminal Procedure Code, stating that he wished this to be done, as there was every chance of the witnesses being gained over. Their statements were recorded by the Honorary Magistrate. On the following day the Sub-Inspector sent the accused to the same Magistrate in order that his statement might be recorded. The accused was then placed before the Subdivisional Magistrate for trial, and was on the 28th September committed for trial to the Court of Session at Mymensingh under s. 302 of the Penal Code.

The accused was tried under that section by the Sessions Judge and a jury, and was on the 16th December unanimously acquitted by the jury.

The Sessions Judge, however, disagreeing with the verdict of the jury, submitted the case to the High Court under s. 307 of the Criminal Procedure Code. The grounds of his opinion were as follows :—

The accused in this case had a wife named Safina Bibi. On the night of the 16th August these two persons were the sole occupants of one of the houses in the accused's *bari*. On the morning of the 17th, the woman was found dead and the accused was not there.

The body was sent in to the subdivisional head-quarters at Jamalpore for *post-mortem* examination, which was made by the Civil Hospital Assistant. He came to the conclusion that the woman had been strangled to death, and is very positive in this opinion. The corpse was that of a perfectly healthy subject, so that there can be no room for doubt as to the correctness of the result of the autopsy.

It having been proved beyond all reasonable doubt that the accused was the only person, who had the opportunity of committing the crime, it seems to me impossible to avoid the obvious inference that he was guilty of it, and I am consequently of opinion that the verdict of the jury is manifestly wrong and altogether opposed to the weight of evidence.

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Moreover, the Jury, although they were directed to make up their minds in the first instance as to whether Safina Bibi's death was due to violence or to natural causes, have not come to any definite finding on this point, and I take this as a sign that they have not properly considered the evidence before them. Besides the circumstantial evidence, two witnesses have deposed to the accused having made an admission of guilt before a meeting of the villagers. Although it is possible to suspect this evidence of having been got up in order to strengthen the case against the accused, I am personally of opinion that it is probably not fabricated. The same remark applies to the evidence of the man Mahan, who confesses to having had improper intimacy with the deceased woman.

I do not consider, however, that it is necessary to believe the evidence on these points in order to justify a finding adverse to the accused.

As stated above, I think that the facts, which have been proved beyond doubt in regard to the cause of the woman's death and the circumstances thereof, are such that it is impossible for any reasonable man to evade the conclusion that the accused Nuri Sheikh is the murderer.

There remains one point which may deserve consideration as telling in favour the accused. The instrument by which the crime was committed is not forthcoming. The woman at the time of her death was wearing a necklace consisting of some 15 silver beads strung on a cord. The investigating officer found this on the body when he viewed it. It naturally suggested itself that this necklace might have been the means used to strangle the deceased, and had it been forthcoming, it would have been possible to form an opinion on this point. But it has disappeared in some extraordinary way, apparently between the time the body was despatched by the Sub-Inspector and its arrival at the dispensary. It was mentioned in the chalan description of the state of the corpse, etc., which was received by the Hospital Assistant from the Sub-Inspector. The Hospital Assistant certainly ought to have taken some notice of the absence of this article, but he did not.

The District Magistrate will be requested to endeavour to get the matter cleared up.

The offence which I consider the accused to have committed is murder as defined in the first paragraph of section 300 of the Indian Penal Code.

Babu Srish Chunder Chowdhury for the Crown.

M. Mustafa Khan for the accused.

PRINSEP AND STEPHEN JJ. The jury unanimously acquitted the accused Nuri Sheikh of murder of his younger wife, Safina Bibi. The Sessions Judge has referred this case to us because he considers that on the evidence the jury should have returned a verdict convicting the accused.

The evidence is that the prisoner slept alone with the deceased, and that some time in the morning at about 8 or 9 o'clock the villagers became aware that she was dead. Their suspicions were,

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however, aroused, and accordingly the chaukidar gave the first information to the police-station distant about four miles. The Sub-Inspector arrived shortly afterwards, and has told us in his evidence that he examined all the witnesses and sent the accused to the Subdivisional Magistrate at Jamalpore, who released the accused on bail, stating that there was nothing but mere suspicion against him. At the *post-mortem* examination of the body it was found that the deceased woman had died from strangulation. The police then renewed the investigation, and on the 22nd, that is to say, three days after the Subdivisional Magistrate had released the accused on bail, the Sub-Inspector sent in seven witnesses before an Honorary Magistrate of Sherpore, that is to say, a Magistrate living on the spot, for examination under s. 164 of the Code of Criminal Procedure, stating as his reason for wishing that such proceedings be taken that there was every chance these witnesses being gained over. The statements of these witnesses were recorded by the Honorary Magistrate, and on the following day the Sub-Inspector sent in the accused to the same Magistrate in order that his statements might be recorded.

The next step in the proceedings taken was that the accused was placed before the Subdivisional Magistrate of Jamalpore, a Magistrate having jurisdiction to deal with it. The Honorary Magistrate, we observe, is a member of what is described as an independent Bench which exercises powers of a third class, and it does not appear that he had any authority to act independently, that is to say, when not sitting on the Bench. It is a matter of surprise, moreover, that, inasmuch as the accused had already been sent to a Magistrate having jurisdiction, that is to say, to the Subdivisional Magistrate of Jamalpore, the police should have thought proper to interpose another Magistrate, and we are not aware, having regard to the distance of this place from Jamalpore, that there was any reason for such a proceeding. It may be added also that there was no ground whatever for asking the Magistrate to act under s. 164 of the Code of Criminal Procedure. The proceedings are therefore irregular. They, moreover, bear the appearance of a desire on the part of the police to have unwilling, or it may be untrue, evidence obtained under some pressure placed on the record so as to bind the persons who had

up to that time been under their influence, and prevent them from afterwards making voluntary statements and possibly from telling the truth without risk of being prosecuted for perjury. We desire to express our strongest disapproval of such proceedings on the part of the police. The law (s. 162) declares that a police officer shall not record any statement made to him by a person under examination. Its object is defeated if, while a police officer cannot himself record such a statement, he can do so by causing certain persons to appear before a local Magistrate not competent to deal with the case and to get the statement of these persons recorded, as he has done in the present case. He had no authority to place those witnesses before the Magistrate. They did not appear voluntarily. The action of the police officer is as if, because he had some reason to believe that these persons were likely to be gained over by the accused or his friends, he was entitled to require their statements to be recorded, though they did not volunteer to make them. In such a case the police officer should rather have sent in the witnesses and the accused without delay and before the witnesses had been "got at," as the police apprehended: he did not do so probably because the Magistrate had discharged the accused, as he considered that no case had been elicited against him except one of suspicion. But that in no way justified the police in acting in this unusual and irregular manner. The accused was then brought before the Magistrate, and his statement was also recorded under s. 164, and the case was then placed before the Subdivisional Magistrate of Jamalpore, who committed the accused to the Sessions Court.

In considering this case, the first matter for inquiry naturally is how did the death of the woman become known. The evidence shows that it did become known in the course of the morning after her death. But no attempt has been made to show how this happened. This was a matter of very great importance because under the circumstances it would be known only to the accused, her husband, or the inmates of the house, and the communication of this information must ordinarily give evidence of the conduct of the accused. The fact that the woman was found dead and that the *post-mortem* examination of her body showed

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that she died of strangulation might raise grave suspicion against the accused, her husband, but taken by itself it would not be sufficient to convict him of having killed her. There is no evidence at all to show what the accused did when the death of the woman became known beyond the statements of witnesses that, when they went to his house, they found him there and the deceased on the bed. There was something said specially in the first information that the prisoner had left his house and gone to Chur Sherpore, from which we understand the suggestion was that he had desired to avoid attendance at any inquiry likely to be held. There is, however, absolutely no reason to suppose that the accused was not present throughout at the village. As regards the evidence of the first information of the death received by the villagers, we learn that Nur Mahomed Sarkar obtained information, so he says, from Nedu, who told him that he had got it from Aniuddin. Aniuddin has not been examined on that point either in the Magistrate's Court or in the Sessions Court. It does not appear that Nedu was examined in the Magistrate's Court or at the trial. Another man mentioned in connection with this matter was Nur Mahomed Sarkar. He was examined before the Committing Magistrate, but not with reference to this point, and, although present at the Sessions Court, the prosecution did not think it necessary to examine him at all. The absence of information on this very important point is, we think, a most serious defect in the case against the prisoner.

Some admission is said to have been made by the prisoner before the village panchayet. We can find nothing in the evidence of this witness to show that the accused really admitted that he killed the woman, and we may observe that evidence so obtained must be accepted with great caution. The police investigation had been commenced, and was really only suspended, as the proceedings subsequently taken show, and there can be little doubt that there was pressure on this account, as is shown by the evidence of some of the witnesses. The case, therefore, against the prisoner rests entirely upon the fact that he slept with his wife alone on that night and in the morning she was found dead, her body showing that death was caused by strangulation.

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We have the evidence of one witness, who says that he was for some months on terms of great intimacy with the deceased, and on the previous afternoon he was seen by the other wife of the accused, who told her husband of it. This is said to be the cause of the murder. We are not prepared to accept this uncorroborated evidence of Maham Sheikh. The case therefore is one only of grave suspicion, but it is not one upon which we should be justified in convicting the accused. We therefore direct that he be acquitted and released.

D. S.

Before Mr. Justice Stevens and Mr. Justice Harington.

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March 7.

EMPEROR
v.
PREO NATH CHOWDHRY.*

Criminal breach of trust by servant—Papers ordered to be destroyed—Property—Appropriation of papers by servant—Penal Code (Act XLV of 1860) ss. 95 and 403—Criminal Procedure Code (Act V of 1898) s. 432.

The accused, a servant, was ordered by his employers in Calcutta to take certain bags of papers and forms belonging to them to their yard in Garden Reach and there to burn and destroy them. Instead of doing this the accused brought some of them to Bow Bazar in Calcutta.

Held, that the act of the accused did not amount to criminal breach of trust under s. 408 of the Criminal Procedure Code. *Empress* v. *Wilkinson* (1) followed.

Held, also, that s. 95 of the Penal Code has no application, unless the act in question would amount to an offence under the Code, but for the operation of that section.

THE accused Preonath Chowdhry was in the service of Kilburn & Co., Agents of the India General Steam Navigation Company at Calcutta. He was ordered by his employers to take several bags of papers and forms belonging to the Company to Garden Reach, where they had a yard, and there to burn and destroy the papers. The accused instead of destroying the papers brought some of them to Bow Bazar in Calcutta.

* Criminal Reference No. 1 of 1902, made by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 19th of February 1902.

(1) (1898) 2 C. W. N. 216.