this is, that though some of the plaintiff's evidence, taken by itself, might have amounted to *primâ facie* proof in her favor still looking to the whole of her evidence, and to the circumstances of the case generally, there was ample ground to justify the lower Court in disbelieving her evidence and dismissing the suit.

If it were always necessary under such circumstances for creditors and others, impeaching transactions of this kind, to give substantive evidence of fraud, they would often be placed in a hopelessly unfair position. They, generally speaking, have no means of unravelling the fraud, or of enquiring into the nature of the transaction, until they came into Court, and they are then generally driven to rely upon the skill of their counsel and the astuteness and good sense of the Judge.

In this case I consider that there were ample grounds in point of law to justify the finding of the Court below, and I therefore concur with Mr. Justice McDonell in dismissing the appeal with costs.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Tottenham.*

### NOOR BUX KAZI AND OTHERS *v.* THE EMPRESS.*

1880 *July* 20.

*Evidence Act (I of* 1872), *ss.* 30, 138—*Confession—Admission—Examination of Witnesses—Judge—Penal Code (Act XLV* 1860), *ss.* 114, 149, *and* 302.

A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate implicating his fellow prisoners and another person. He subsequently withdrew this statement, and made another, in which he endeavoured to exculpate himself.

*Held*, that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself,

* Criminal Reference, No. 39, on Appeal No. 362 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 21st May 1880.

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and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

*Held*, that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

FIVE persons, Jamir Mundle, Taiyab, Rabiullah, Noor Bux Kazi, and Daghu, were charged with being members of a body of men, some hundred in number, who, at the instigation of one Amiruddin Khan, on the 1st February 1880, armed with spears and clubs, went to take possession of certain lands in Mouza Kumarpur. It was alleged that one Kalu Shaikh (who was not before the Court) had speared one Kobin Sircar, who had opposed the entrance of the mob on his lands, and Jamir Mundle was charged with having struck him on the head with a *lati*, from which injuries Kobin died. It was further charged that, at the same time, Taiyab slightly wounded with a spear one Reza Mahomed, a cousin of Kobin, and that Noor Bux Kazi (unarmed) and Rabiullah, and Daghu (armed with deadly weapons) were all present at the time, as leaders of the rioters.

The four accused firstly mentioned pleaded an *alibi*. Daghu, who was arrested on the 5th February, stated before the Committing Magistrate, that he went to Kumarpur with a body of armed men, and that Kalu, Jamir Mundle, Taiyab, and Noor Bux were amongst the party. On the 24th February, before the Sessions Judge, he, however, repudiated this statement and said, that he was forced to accompany the other armed men, but that he only did so as far as Husbendi (a place adjoining Kumarpur), where he escaped, and that he did not see Noor Bux, Rabiullah or Jamir Mundle, as he did not go to Kumarpur.

The Sessions Judge, differing from the assessors, found that

Noor Bux, Jamir Mundle, and Taiyab "were members of an unlawful assembly in the prosecution of a common object, in which murder was committed by Kalu, which offence they knew to be likely to be committed, and the commission of which offence they, being present, actually abetted;" and that they had, therefore, committed an offence under ss. 114 and 149, read with s. 302, of the Penal Code. But concurring with one assessor, he found that Daghu and Rabiullah were guilty of rioting armed with deadly weapons, and had committed an offence under s. 148 of the Penal Code.

He, therefore, sentenced the two latter to three years' rigorous imprisonment, and the three former to death.

The case was referred to the High Court in the usual way for confirmation of the sentence of death, and Noor Bux Kazi, Jamir Muudle, and Taiyab preferred an appeal from that sentence.

Mr. *Jackson* and Munshee *Serajal Islam* for the appellants.—The statement made by Daghu before the Committing Magistrate cannot be said to be a confession such as is mentioned in s. 30 of the Evidence Act. In order to implicate the prisoners Daghu must have implicated himself. This he did not do. Daghu could not be convicted on his own statement alone, neither can the prisoners on Daghu's statement. Moreover, the statement was withdrawn at the Sessions Court. [GARTH, C. J.—It is surely evidence against them, if it amounts to a confession by him that he was a member of an unlawful assembly; it is certainly a confession that he was present with Amiruddin's men.] To render the statement a confession under s. 30, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is used—*The Queen* v. *Belat Ali* (1); see also *The Queen* v. *Mohesh Biswas* (2). There is a difference between an admission and a confession. The confession must be something on which the Court could act without further evidence. [GARTH, C. J.—If the statement is admissible for the purpose of showing that Noor Bux was present, may we not connect

(1) 10 B. L. R., 453. (2) *Id.*, 455.

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that with the other evidence? If the Court were satisfied with the identity of the prisoners, would that not be sufficient?] The case of *Regina* v. *Amrita Govinda* (1) is a direct answer. It is there laid down that if an abettor of a crime is, on account of his presence at its commission, to be charged as a principal, his abetment must continue down to the time of the commission of the offence. At any time before that event he may change his mind, and withdraw from the abetment. What is the meaning to be attached to the words "the Court may take into consideration" in s. 30? There is no proof that the statement was not made behind the back of Noor Bux. It was made on the 6th February, and Noor Bux was only arrested on that day, and the witnesses for the prosecution are near relatives of the deceased. As to the case against Taiyab there is no suggestion that he was present and committed the murder. Section 149 of the Penal Code was never intended to refer to a charge of murder; see the case of *The Queen* v. *Sabed Ali* (2.

No one appeared for the Crown.

The judgment of the Court (GARTH, C. J., and TOTTENHAM, J.) was delivered by

GARTH, C. (J. who, after stating the facts, proceeded to deal with the evidence against each prisoner individually, and with regard to the statement made by Daghu before the Committing Magistrate as affecting Noor Bux, observed):—

The Judge also attaches some weight to what he calls the original confession made by one of the prisoners named Daghu (who has been convicted under s. 148, Penal Code) to the Committing Magistrate, in which he mentions Noor Bux Kazi as present. It is our duty to point out to the Judge that this statement of Daghu's, which we have read, is no sort of evidence against Noor Bux even under s. 30 of the Evidence Act, for it is not a confession; it does not amount to any admission by Daghu himself, that he was guilty in any degree of the offence charged; but it is simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate

(1) 10 Bom. H. C., 499. (2) 11 B. L. R., 347.

himself. Any mention made by him in such a statement of other persons having been engaged in the riot, is altogether irrelevant, and is not evidence against them either under s. 30 or otherwise.

(The learned Chief Justice then went into the further evidence, and finding, with regard to Noor Bux, that there was not sufficient evidence of his having been present at all, ordered the conviction as regards him to be set aside. With respect to the other two appellants, the Chief Justice found that they were members of the unlawful assembly, but there was not sufficient evidence to show that the object of the assembly was the murder of Kobin; nor that they, as leaders of the assembly, openly incited the others to cause his death, and therefore they ought not to be found guilty of murder, but only of rioting under s. 148 of the Penal Code. The learned Chief Justice then concluded as follows):—

We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of s. 138 of the Evidence Act, and not fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away, in anticipation, the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. The Judge's power to put questions under s. 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present, case.