1901

BARAOORA TEA CO. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

and, as has been already seen, the Tea Company have had to import some 50 or 60 coolies for the working of the severed portion of the garden which in itself must have involved a considerable initial outlay.

On this basis, or rather on the basis of the average working charges per acre per *annum*, we compute that the additional expense of working the severed part of the garden will amount to some £50 per annum which, if capitalised at 10 years purchase, will work out to Rs. 8,000. This sum, we think, will fairly compensate the company for its loss under the present head, and to that extent accordingly we decree the appeal. In other respects the decree of the District Judge will stand.

With respect to the question of costs we are not disposed to interfere with the order of the lower Court. But in this Court, we think, the appellants are entitled to receive their costs from the respondent in proportion to their success, and we decree accordingly.

S. C. B.

CRIMINAL APPEAL.

Before Mr. Justice Ghose and Mr. Justice Taylor.

YASIN AND OTHERS . . . . APPELLANTS.

1901 *Jan. 4.*

v.

KING EMPEROR . . . . RESPONDENT.*

Confession, retracted confession, evidential value of, against maker and co-accused—Corroboration—Convictions, evidence of previous—Accused, examination of, in respect of previous convictions—First offences—Sentence—Evidence Act (I of 1872) s. 91—Criminal Procedure Code (Act V of 1898), ss. 342 and 511—Penal Code (Act XLV of 1860), ss. 411 and 457.

A retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.

* Criminal Appeal No. 278 of 1901.

1901

YASIN
v.
KING
EMPEROR.

In order to support a charge of a previous conviction, there should be on the record a copy of some judgment or extract from a judgment or some other documentary evidence of the fact of such previous conviction, as is required by s. 91 of the Evidence Act or s. 511 of the Code of Criminal Procedure. The *examination by a Magistrate of the accused in respect of* such previous conviction is without legal warrant or justification.

Basanta Kumar Ghattak v. *Queen-Empress* (1) followed.

ON the 23rd of July 1900, the house of the complainant was broken into and certain property stolen. Upon information received from one Abdul Ali, the appellants and two other persons were arrested sometime after the occurrence. Two of the appellants Nazim and Yasin made confessions. Yasin subsequently retracted his, alleging that he had made it in fear of his life. The appellants were convicted by the Sessions Judge of Sylhet under ss. 411 and 457 of the Penal Code. They were sentenced under s. 457 only, Nazim in consideration of his previous convictions to ten years' and the others to three years' rigorous imprisonment.

No one appeared for the accused.

JANUARY 4. The judgment of the Court (GHOSE and TAYLOR, JJ.) is as follows :—

In this case the four appellants Nazim, Arabdi, Yasin and Taimiz have been convicted by the Sessions Judge of Sylhet. He has found all the men guilty under ss. 457 and 411, and has sentenced Nazim, in consideration of his previous convictions, to 10 years' rigorous imprisonment, and the others to three years' under the same section, and has passed no sentence under s. 411 of the Indian Penal Code. One of the Assessors found the case not established against the two appellants Yasin and Tamiz.

The judgment of the learned Sessions Judge proceeds largely upon "confessions" since retracted, which he has used not only against the makers, but also against the other accused in the case.

It is obvious that a retracted confession should carry practically no weight as against a person other than the maker; it is not made

(1) (1898) I. L. R. 26 Calc. 49.

on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. In the present case the Judge has acted upon these confessions without any indication that he has appreciated this inherent weakness.

We will now consider the facts of the case. On the 23rd July 1900 the house of the complainant was broken into under circumstances which amounted to an offence under s. 457 of the Indian Penal Code. Property was stolen, and upon information from one Abdul Ali, the appellants and two other persons were arrested some time after the occurrence. Nazim and Yasin made confessions, and there is the evidence of the wife of Nazim to the effect that Nazim and Arabdi and others went to commit theft and afterwards divided the spoil. There is also evidence that Tamiz gave up some buttons, which were part of the stolen property. As to the propriety of the conviction of Nazim, there can be no doubt his confession of the 11th October was repeated on the 30th; and it was not withdrawn at the trial; it is marked by the Sessions Judge as put in evidence. It is to be noted that in the second statement he exculpated Yasin, saying he did not go to commit the theft, and the evidence of his wife does not inculpate Yasin. Even if the statement of Nazim was ever formally put in evidence against Yasin, the latter certainly was not questioned in respect of it. It does appear, however, that on the 11th October Yasin admitted before a Magistrate that he was one of the party of thieves, and that he got Rs. 15 as his share, but that he had spent it. On the 30th October he alleged that he had made the statement in fear of his life. This was, apparently, his first opportunity of retracting. His confession was by no means full of detail. The evidence on record does not show when the arrest was made, or how the appellant came to make a confession, when no property was found in his possession.

As Nazim contradicts himself in respect of Yasin, and as he also tried to minimize his own guilt by saying that he protested against the expedition, the case against Yasin practically rests on

1901

YASIN v. KING EMPEROR.

his uncorroborated and retracted confession. This is not sufficient under the circumstances of this case to warrant his conviction.

Arabdi made no confession, but he was named by Yarchand, the wife of Nazim, as having advised the theft, and as having joined in it. The accusation by Nazim may be considered against him, if that statement was put in evidence against him, but as there is no allusion to it in the examination of this man, it seems doubtful whether it was really put in evidence against him. At any rate, its evidential value would be of the slightest. The confession of Yasin must be discarded as against Arabdi. There is, however, the further fact that some of the stolen property was recovered from this man. His explanation of its possession is not satisfactory. He admits that he burnt a sack in which the buttons were kept and that he gave the buttons to Tamiz to dispose of, as he was told that the possession of them might damage him. We do not doubt his knowledge, that the property was stolen, and his explanation is not sufficient.

Finally we have Tamiz. He did not confess, and said that the buttons were given to him by Arabdi, and that he hid them in some water, and gave them up to the police. Putting aside the mention of his name by Nazim and Yasin, it is sufficiently proved that he received the buttons with the knowledge that they were stolen property.

Then as to the punishment, Nazim has been sentenced to ten years' rigorous imprisonment, and the others to three years each. As in the case of the appellants other than Nazim it is admittedly a first offence, the sentence in their case is too severe. Cases of this nature are constantly settled by the Court of the Magistrate and only in exceptional circumstances do they require a heavier sentence than a Magistrate is competent to inflict. While acquitting Yasin altogether, we would reduce the sentences upon Arabdi and Tamiz to two years' rigorous imprisonment each.

But in regard to Nazim, who has admitted in his examination in the Lower Court that he has been three times previously convicted, once in 1889, twice in 1890, and once by the Sessions Court in 1894, when he was sentenced to six years, all the convictions

being for theft or receiving stolen property, the case is on a different footing.

1901

YASIN v. KING EMPEROR.

Now there is on the record no copy of any judgment, or extract from a judgment or any other documentary evidence of the fact of such previous convictions as is required by s. 91 of the Evidence Act, or s. 511 of the Criminal Procedure Code. There was thus no legal evidence to support the charge in respect of such previous convictions. The examination of the appellant in the Lower Court in respect of those convictions was also without legal warrant or justification; see s. 342 of the Criminal Procedure Code, and the case of *Basanta Kumar Ghattak* v. *Queen Empress* (1).

But on the Sessions record pages 39 and 46, we have a record of an admission by the appellant Nazim of the previous convictions duly recorded. Under s. 310 of the Criminal Procedure Code, the Judge was justified in proceeding to pass sentence on him accordingly. The irregularity in the inquiry is to be regretted, and should have been detected and remedied at the trial, but it does not appear that the accused was prejudiced by reason of it.

As for the sentence on Nazim, he appears to be incorrigible, he can only very recently have been released from jail, and is again in his evil ways. We dismiss his appeal.

D. S.

PRIVY COUNCIL.

AHMAD YAR KHAN AND OTHERS . . . . PLAINTIFFS

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER . . . . . DEFENDANTS.

P. C.* 1901 *Feb.* 20, 21, *March* 6 & *May* 11.

[On appeal from the Chief Court of the Punjab.]

Construction—Expectation raised and acted upon of a grant of land from the proprietor to a person encouraged by him to lay out money thereon—Irrigation canal—Waste land of Government—Stipulation as to possession of the canal.

* *Present*: THE LORD CHANCELLOR (LORD HALSBURY), and LORDS MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.

(1) (1898) I. L. R. 26 Calc. 49.