REG. v. ALIBHA'I MITHA'.

1871.
June 15.

Evidence—Conditional Pardon—Confession—Admissibility of Confession in Evidence—Act II. of 1855, Sec. 32—Crim. Proc. Code, Secs. 209 and 210.

A conditional pardon was tendered to and accepted by the accused. He then, on solemn affirmation, made a statement before the committing Magistrate in which he criminated himself and two other persons. Three days afterwards he voluntarily came forward and made, on solemn affirmation, another statement, in which he retracted and contradicted what he had said in his former statement. The conditional pardon was thereupon cancelled, and the accused was put upon his trial.

Held that the first statement was admissible as evidence against the accused, under Sec. 32 of Act II. of 1855.

THE accused—a Bohrá of the Broach Collectorate—was tried, on a charge of murdering his on mother, by W. H. Newnham, Session Judge of the District of Súrat. He was convicted and sentenced to death.

The facts of the case, as found proved by the Session Judge, were these.

The accused, Alibhái, and his family were on terms of enmity with one Umar Vali and his family. There was an affray between the two families, and Gori, the mother of the accused, was slightly wounded on the head. By whom or how this wound was inflicted was not clear; but for treatment of this wound she was admitted into the Civil Hospital at Broach, where, after remaining for three days, she died. Shortly after her death, the accused, Alibhái, complained to the Magistrate F. P. that she had been killed by the beating inflicted upon her by their enemy Umar Vali and his associates, against whom criminal proceedings were, accordingly, taken, but they were ultimately discharged; and the accused was himself charged with the murder.

The Session Judge further held that it was proved that the cause of the woman Gori's death was arsenical poisoning, and not any external injury; that during her residence in the Broach Hospital some food was supplied to her by the accused; that there was every reason to believe that that food contained poison, and that the accused had knowledge that that was the fact.

1871.
REG. v. ALIBHA'I MITHA'.

On arriving at his conclusion on this last point, the Session Judge observed that without the accused's own statement he should hesitate to convict him. This statement was that the accused first intended to make a charge of simple assault against Umar and his friends, but that at the instigation of his own comrades he poisoned his mother and charged Umar and his friends with murder. The statement and its withdrawal took place under the following circumstances :—

During a preliminary investigation before the committing Magistrate into the conduct of three persons suspected in this matter, the Superintendent of Police in charge of the case suggested that a conditional pardon should be tendered to the accused, Alibhái. This was done, and Alibhái, being examined as a witness on solemn affirmation, made the statement alluded to above, on the 24th of March 1870. Three days afterwards, Alibhái appeared before the Magistrate of his own accord, and, also on solemn affirmation, made another statement, in which he denied all that he had said before, and asserted that he had been induced to make the first statement by the persuasions of his enemies. His pardon was thereupon cancelled, and he was committed for trial.

At the trial it was objected, when it was proposed to put in evidence the prisoner's first statement, that it, being upon solemn affirmation and made as a witness, was not admissible in evidence against him except for purposes of a trial for giving false evidence. The Session Judge upon this objection ruled as follows :—

"Sec. 32 of Act II. of 1855 runs as follows :—'No such (criminating) answer which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination..... be used as evidence against such witness in any criminal proceeding.'

"I have not been able to find any ruling of the Bombay High Court on this privilege with regard to approvers; but there is a ruling quoted from the Calcutta Weekly Reporter in Prinsep's Procedure Code—a criminal letter, in the case

of *Reg.* v. *Rudanath Dossadh* (*a*)—declaring that a statement made under promise of pardon is *not* admissible against the accused. This does not, however, refer to the above section of the Evidence Act, but says that to admit such would be contrary to the policy of Sec. 203 of the Code of Criminal Procedure. The judgment on the case in appeal, however, (8 Calc. W. Rep., 53 Cr. R.) bears the name of one Judge only; and as Sec. 209 is specially excepted in the above-quoted Sec. 203, and this question arises from proceedings under Sec. 209, I am doubtful as to the soundness of the decision.

"First, with regard to the words of the section of Act II. of 1855, the question is, Was this a statement which the witness was *compelled* to give? On behalf of the accused it may be urged that compulsion arises from the solemn affirmation, under Sec. 179 of the Penal Code, which is quoted in note to Sec. 32 of Act II. of 1855 in West's Code. But I do not consider that there was compulsion in this case from the fact of the evidence being given, as by law demanded, on solemn affirmation. The accused had in the first instance agreed, on receiving a conditional pardon, to make a 'full, true, and fair disclosure' of all the circumstances connected with the crime: and the affirmation could not create any stronger obligation after he had so agreed.

"With regard to the constraint or compulsion implied by an oath, Taylor, Vol. I., p. 797, 5th ed., Sec. 821, says: 'If a prisoner, on being examined *as a witness*, has consented to answer questions to which he might have demurred, as tending to criminate himself.....his statement will be deemed voluntary, and, as such, may be subsequently used against him,' &c. Now in this case the accused had, *before* he was made a witness, consented, under his conditional pardon, to *make a full disclosure*, irrespective of the obligation of the solemn affirmation, and he might have refused to become an approver altogether. I apprehend, then, that after such consent his evidence was, and remained, voluntary; that it

(*a*) 8 Calc. W. Rep., 14 Cr. Letters.

1871.
REG. v. ALIBHA'I MITHA.

did not become compulsory because made on solemn affirmation; that Sec. 32 of Act II. of 1855 is designed not to protect approvers (who have a conditional protection beforehand), but ordinary witnesses who may have to answer criminating questions; and that it does not exclude this evidence.

"Secondly, as above said, I cannot see that Sec. 203 of the Code of Criminal Procedure excludes this evidence—see Goodeve on Evidence, 596: 'Were the inducement held out conditional on some act to be done by the accused himself, and he to break the condition, this would be tantamount to a forfeiture of the protection implied in the inducement, and leave the confession admissible;' and the example given is the case of 'King's evidence.'

"My attention has been drawn to Russell on Crimes, Bk. VI., Ch. V., Sec. VI., on Accomplices (Vol. III., 4th ed., p. 596), &c., where several cases are quoted. (Note *v*, p. 598.) Among these is *Reg.* v. *Holtham and five others* (1843), 'where an "accomplice," who had made a full disclosure of the fact'..... *before the committing Magistrate,* refused before the Grand Jury to give any evidence at all. Wightman, J., ordered his name to be inserted in the bill of indictment, and he was *convicted on his own confession.*' This last is a very strong case in point.

"But it might be objected that the statement is excluded (irrespective of Sec. 32 of the Evidence Act) by its having been made on solemn affirmation. On this subject Goodeve again says, p. 597: 'It has been questioned, indeed, whether in any case in which an examination has been taken on oath it would be admissible;.....the better opinion, however, is that there is no weight in the objection; and undoubtedly there are many cases in which it has not been adhered to.' See also Taylor, Secs. 818, 819.

"Lastly, if it be urged that the accused, pardon having been withdrawn, is placed in a worse position than before, by admitting against him what he has said under promise of pardon, I reply that it is his own doing; he has broken

faith with the Crown, and has no possible claim to be replaced in the *status quo antè*, either on grounds of justice or public policy.

"For the above reasons, I consider it clear that the evidence in question should be admitted for what it is worth."

Having thus disposed of the point as to the admissibility of the accused's statement, the Session Judge reviewed the other evidence in the case, and convicting the accused, Alibhái, passed sentence of death upon him, subject to the confirmation of the High Court.

In the High Court the case was heard by GIBBS and WEST, JJ.

Girdharlál Dayáldás, for the convict, objected to the admissibility of his statement.

Dhirajlál Mathurádás (Government Pleader) appeared for the Crown, but was not called upon to reply.

PER CURIAM:—The trial of this case being in other respects regular, the prisoner's statement was admissible in evidence. A confession improperly obtained—that is, by means of hopes and fears, caused in ways disapproved by the law—is rejected as evidence. But in this case no improper means were resorted to; nothing was done but what the law distinctly approves: and the prisoner, having voluntarily become a witness, is subject, like other witnesses, to have what he said in that capacity used against himself. The law on the subject of criminating questions is not in the satisfactory state which it may be hoped it will shortly assume, but it is sufficiently clear that the proper connection of Sec. 32 of Act II. of 1855 and of Sec. 179 of the Indian Penal Code is this—that the former establishes an obligation to answer all questions put by a competent authority, while the latter provides a specific penalty for failure in the prescribed duty. That duty is in part assumed as existing, and in part defined by the earlier enactment, and, where defined, defined on the assumption, to be clearly gathered from the proviso, of an exercise of compulsion by the court, which can have

1871.

REG. v. ALIBHA'I MITHA'.

no place where the whole statement is made without reluctance and without protection being claimed.

The provisions in Secs. 209 and 211 of the Code of Criminal Procedure assume that guilty persons may make statements under conditional pardons and be afterwards committed for trial. The ordinary rule is that everything from which a reasonable inference can be drawn as to the facts in issue is evidence, and if it had been intended that this particular kind of evidence should be inadmissible, a clause to that effect would have been inserted in the Code. The law protects an informer who tells the truth; one who perverts it deserves no protection. And if the former of the prisoner's two statements in the case was the false one, it places him in no worse position than any other accused person who without lawful excuse has made a false confession.

The only case cited at the bar against this position is *Reg.* v. *Radanath Dossadh* (*b*). This was more a dictum than a regular decision arrived at after argument. Mr. Justice Kemp, who was the only sitting Judge in that case, observed: "The statement made under the promise of pardon is no evidence against the prisoner. To admit such would be contrary to the policy of Sec. 203 of the Code of Criminal Procedure, as observed by the Judges of this court on review of the jail delivery statements." With due deference to the opinion of the learned Judge, we think the admission of the statement in question is opposed neither to the policy of the section quoted, nor to the interests of justice. We are confirmed in our opinion by the alteration effected in this section by the Criminal Procedure Amendment Act of 1869, two years after the decision of the above case in 1867. Before amendment Sec. 203 ran thus: "No influence, by means of any promise or threat or otherwise, shall be used," &c.; now, the most important words, "except as provided in Section 209," are placed prominently at the commencement. The prisoner, without any pressure having been put upon him, came forward and

(*b*) 8 Calc. W. Rep., Cr. R. 53.

made his statement before the Magistrate; and we must, therefore, take it to be perfectly voluntary. We do not think that the circumstance of its having been made on solemn affirmation renders it invalid. On this point Taylor, in Sec. 820, p. 795 (5th ed.), says: "And, indeed, the rule excluding sworn confessions seems strictly confined, at Common Law, to the case of a statement made by the party upon oath *while a prisoner under examination* respecting the criminal charge. It is true that one or two decisions by Mr. Baron Gurney might be cited which seem to extend the rule somewhat further, and to render inadmissible confessions made on oath to magistrates or coroners by parties who, after being examined *as witnesses*, have themselves been committed for trial; but the authority of these decisions has been much shaken by subsequent cases, and they cannot now be safely relied upon as law."

The statement made by the prisoner being thus admissible, we are of opinion that that alone is a sufficient foundation on which to base a conviction of murder. In this case there is ample corroborative evidence to establish the prisoner's guilt. We shall, therefore, uphold the conviction, but, declining to confirm the sentence of death, pass upon him a sentence of transportation for life.

Note.—The two following cases are inserted here in explanation of the circumstances under which the murder in the above case was committed. The facts appear in the judgments of the Court.

REG. v. MUHAMMAD VALLI.

22nd September 1871. GIBBS, J.:—The prisoner is charged with the murder of his sister, and this forms one of the three cases which have arisen out of the party feuds in the village of Karmár, in the Broach District, the general history of which will be found in the court's judgment in the case of Muhammad and Husan A'manji (see next case).

The principal witness in this case is the Pársi cloth-seller Rastamji, whose evidence appears to have been given in a straightforward, truthful manner, which impressed both the Session Judge and the assessors with the feeling that he was a witness to be believed. According to this man's statement, he was standing talking with the prisoner's father on business, when his attention was drawn to the prisoner by hearing a woman exclaim "Why do you kill me for other people?" and, on looking towards