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March 22, 23, 24, April 12.

REG. v. KA'SHINA'TH DINKAR, GOVIND NA'RA'YAN, and SA'I NARSA'PPA'.

Confession—Warning by Magistrate to Accused—Allegation of Maltreatment prior to Warning inducing Confession—Appeal to Sessions Court—Inquiry by Sessions Court—Prisoners affirmed—Admissibility of Evidence—Perjury—Sanction for Prosecution pending Inquiry—Causing Evidence of Crime to disappear—Crime committed by Accused—Ind. Pen. Code, Sec. 201—Abetment—Advocate's Privilege of Speech—Untrue Statements in Petitions—Contradiction upon Affidavit—Public Prosecutor, Duty of—Improper Appointment—Magistrates to be examined on Oath.

Although the averment on the record of a Magistrate by whom a prisoner is tried, that the accused, before making a confession, was warned that it was optional with him to answer the questions put to him or not, is on appeal conclusive as to the fact of such a warning having been given, it is not conclusive to show that such a confession has not been made under the influence of fear engendered by *previous* maltreatment, or is not otherwise valueless.

Allegations, made in a regular and proper manner before a Sessions Court on appeal, that a confession made by the accused before the Magistrate who tried the case was made under such circumstances as to preclude its admissibility in, or diminish its value as evidence, should receive due attention and be inquired into. A Sessions Court refusing to make such inquiry commits a grave error in law and procedure.

Upon an inquiry which the High Court directed the Session Judge to make into such an allegation, the prisoners were ordered to be, and were, solemnly affirmed, and the prosecution neither objected to the form of the order nor to the affirmation of the prisoners, and moreover cross-examined them, but objected to their evidence being used upon the return of the inquiry. It was held that the objection, though possibly good if taken in time, was too late, and that the evidence of the prisoners might be used, whether the order directing them to be affirmed was correct or otherwise.

Where *during* such an inquiry the Sessions Judge accorded his sanction to the prosecution for perjury of some of the witnesses who deposed on behalf of the prisoners, the High Court considered such a proceeding improper, and eminently calculated to defeat the object of the inquiry.

Semble. A person cannot be convicted, under Sec. 201 of the Penal Code, of causing evidence of the commission of an offence by himself to disappear, nor can he be convicted of the abetment of such an act (per *Lloyd* and *Kemball*, JJ.).

Question as to the extent of the privilege of speech accorded to counsel and advocates considered.

Important statements made in verified petitions to the High Court, if untrue, should be contradicted on affidavit.

Appointment of the Magistrate, who in the first instance had tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case, censured as being unprecedented and objectionable. A Public Prosecutor should be without a personal interest in the cases which he conducts.

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Prisoners should be allowed to have free converse with their *vakils* out of the hearing of the police officers in charge of such prisoners.

It is undesirable that Magistrates whose decisions are under appeal, or who have been engaged in promoting the prosecution, or police officers concerned in a case, should sit on the bench beside, or converse privately in court with, the Judge who is engaged in trying the prisoners' appeal. If the appellate Judge wishes to ascertain any facts relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate upon oath or solemn affirmation, in the same manner as an ordinary witness.

THE accused were convicted by C. B. Pritchard, Magistrate F. P. in Khándesh and Násik, on a charge "that they, knowing, or having reason to believe, that an offence had been committed, abetted the causing of evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, contrary to Secs. 109 and 201 of the Indian Penal Code," and were sentenced each to suffer rigorous imprisonment for eighteen months and to pay a fine of Rs. 1,000, or in default to be rigorously imprisoned for a further period of three months.

The accused appealed to the Session Judge of Khándesh, who confirmed the conviction and sentence.

An application was then made to the High Court for the exercise of its extraordinary jurisdiction. Upon this application the record and proceedings in the case were sent for, and upon their receipt the matters of the application were argued before LLOYD and KEMBALL, JJ.

Anstey (with him *Shântárám Náráyaṇ* and *Ghanashâm Nilkaṇt*) appeared for the applicants, and contended that the convictions could not be upheld, principally upon the following grounds:—(I.) Because it appeared, from the record sent up by the Magistrate, that the offence (if any) of which the prisoners were accused of having abetted the causing of the evidence to disappear, was an offence committed by themselves—a case not within the purview of Sec. 201 of the Penal Code; (II.) because the abetment of the offence (if any) had taken place in the Násik collectorate, where the Magistrate who tried the case had no jurisdiction; (III.) because the conviction was based upon the confessions of the accused, which

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had been extorted from them by torture, and that the Sessions Judge had refused to inquire into the allegations of such torture, though he had been in due course called upon to institute such inquiry.

Ganpatráv Bháskar, on behalf of *Dhirajlál Mathurádás* (Government Pleader), appeared for the prosecution.

Cur. adv. vult.

On the 16th of December 1870 the judgment of the Court was delivered by LLOYD, J. :—In this case Káshináth Dinkar, Govind Náráyan, and Sái Narsáppá have been convicted by Mr. Pritchard, who styles himself Magistrate F. P. in the Khándesh and Násik Districts, and each has been sentenced to eighteen months' rigorous imprisonment, and a fine of Rs. 1,000, or in default three months' rigorous imprisonment, under Secs. 201 and 109 of the Indian Penal Code.

The Session Judge of Khándesh having thrown out their appeal, the prisoners have applied to this court for the exercise of its extraordinary jurisdiction; and amongst the grounds urged in their petition, the one which has taken precedence in the argument of the learned counsel for the prisoners is that the applicants cannot be convicted under Secs. 201 and 109 of the Indian Penal Code.

This trial has arisen out of frauds which are alleged to have been committed during the progress of certain works which were carried on, under the supervision of the Public Works Department, for the relief of the population suffering from the famine which prevailed in the district of Khándesh in the year 1869.

In the 3rd para., and again at the conclusion of his finding, tho Magistrate observes that "the evidence, the disappearance of which the accused have been convicted of abetting, would, the Court fully believes, have shown that they had embezzled very large sums of Government money, and that the disappearance has proved their screen from due punishment."

It must be taken, therefore, as found, that the offence of which the evidence has been caused to disappear was com-

mitted by the accused themselves, but it is argued that the law quoted applies to the causing the disappearance of evidence of an offence committed by another, and not by the person who is charged with causing the disappearance; and in support of this proposition the cases noted at page 149 of Mayne's Commentaries, 6th ed., have been referred to (*a*).

In neither of these cases does it appear that the point was argued; and it is to be regretted that in the present instance the case for the prosecution, which is one of considerable importance, was not entrusted to the Advocate General or some other law officer of the Crown.

Sec. 201 and the two following sections commence with precisely the same words, thus: "Whoever knowing or having reason to believe that an offence has been committed:" now, as there is no law which obliges a criminal to give information which would convict himself, it is evident that Secs. 202 and 203 could not apply to the person who committed that offence, *i.e.*, "the offence which he knew had been committed;" and Sec. 201 should, we think, be construed in a similar manner: and, looking at the only illustration which follows Sec. 201, it would appear that the law was intended to apply exclusively to "another," and we are, therefore, of opinion that the conviction of the accused, as accessories to an offence known or believed to have been committed by themselves, is illegal.

That being so, it remains for us to look into the evidence to ascertain whether there is proof on the record of the convicts' guilt in respect of any other offence connected with the matter under investigation, with which they ought to, or might, have been charged. As regards Káshináth, after reading over the papers in the case, we see no alternative but to order his release, as we deem the evidence of Sitárám and other witnesses quite insufficient to sustain the convic-

(*a*) The High Court of Bengal has ruled that this "section applies to the causing the disappearance of evidence of an offence committed by another, not by one's self (1 R. C. C. Cir. 19). The person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of charge (3 R. C. C. Cr. 3)."

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tion of this convict of any particular act of fraud. With regard to the other two convicts, the case, however, is quite different, for we have on record express admissions, contained in their examinations before the Magistrate, of various particular frauds perpetrated by them; but a great deal has been said in the course of the argument with respect to undue influence having been exercised to induce Govind Náráyaṇ and Sái Narsáppá to confess their guilt, and indeed the learned counsel for the prisoners has not hesitated positively to assert that cruel and revolting practices were resorted to, in the presence and with the approval of the trying Magistrate, to extort these confessions, and that subsequently the prisoners were debarred from free intercourse with their *vakíl*. The details of this abuse of authority are alleged to have been set forth in a written paper presented at the hearing of the appeal, but which the Session Judge declined to receive.

In his minute Mr. Hobart says he would not receive a written statement offered by the *vakíl*, because he refused to state the contents of it, and "it was contrary to the practice of his court to receive anything of this sort from a *vakíl*." It is alleged that the Session Judge was aware of the contents of the document, but, whether he was so or not, considering the circumstances of the case, Mr. Pritchard being in the position of prosecutor as well as trying Magistrate, we do not think he exercised a sound discretion in declining to receive it.

However, looking to the complexion the case now bears, it becomes absolutely necessary, to enable us to dispose finally of the appeal, that the circumstances under which the admissions were made should be investigated and reported to us. The Session Judge is, therefore, directed to send for the said two convicts, and, after calling upon them to give on solemn affirmation a detailed statement of the undue influence practised upon them, to inquire fully into their complaint, giving the Government Prosecutor due notice of the investigation, and, after recording the evidence, to forward it, together with his opinion thereon, to this court. Then

followed some dicta as to the jurisdiction of Mr. Pritchard as a Magistrate in the Násik collectorate, which it is not material to set forth here, as the question was afterwards and finally decided by the Full Court.

In pursuance of the directions contained in the above judgment, the Honorable George Hobart held an inquiry into the allegations of torture made by the prisoners. Mr. Pritchard, the Magistrate who had originally tried the case, but who at the time of the inquiry was employed by Government in tracing out certain frauds that were alleged to have been committed in the Public Works Department, was, under the circumstances mentioned in the judgment of the Full Court, appointed by Mr. Ashburner (District Magistrate of Khándesh) to act as Public Prosecutor on the taking of the inquiry.

The prisoners were examined on solemn affirmation, and deposed to several alleged acts of torture committed upon them by the police. Several witnesses were also called to corroborate their statements. After the case for the accused was closed, but before the witnesses on behalf of the Crown were examined, the Sessions Judge, on the application of Mr. Pritchard, gave his sanction to the prosecution for perjury of some of the witnesses, who had been examined for the accused, and one of these witnesses, during the pendency of the inquiry, was tried but acquitted.

On the close of the inquiry the Sessions Judge reported his opinion upon it. The material portion of his report was as follows:—

"In certifying to the High Court the evidence taken and recorded, I shall express my opinion to this effect, namely, that beyond the fact of Govind Náráyaṇ and Sái Narsáppá being, at other times than when brought before the Magistrate during their trial, occasionally kept handcuffed, it has not been proved that either Govind Náráyaṇ or Sái Narsáppá was in any way harshly treated, still less subjected to torture. I am of opinion that the evidence shows that the Magistrate was aware that Govind Náráyaṇ and Sái Narsáppá were so

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kept handcuffed, and that he does not appear to have interfered to prevent it; and I think it is to be regretted that this restraint was imposed on Govind Náráyaṇ and Sái Narsáppá, because there is nothing to show that either of them was so conducting himself as to make such restraint necessary."

Upon this return being made, the case came for final determination before a Full Bench composed of WESTROPP, C.J., LLOYD, MELVILL, GREEN, and KEMBALL, JJ.

Anstey (with him *Shántárám Náráyaṇ* and *Ghanashám Nilkanṭ*) for the prisoners.

McCulloch (with him *Dhirajlál Mathurádás*, Government Pleader) for the Crown.

The case was heard on the 22nd, 23rd, and 24th days of March 1871.

Cur. adv. vult.

April 12th. WESTROPP, C.J.:—Upon the 13th of May 1870, Káshináth Dinkar, Govind Náráyaṇ, and Sái Narsáppá were, by Mr. C. B. Pritchard, Magistrate F. P., found guilty upon a charge that they, knowing, or having reason to believe, that an offence had been committed, abetted the causing of evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, contrary to Secs. 109 and 201 of the Penal Code, and were sentenced each to suffer rigorous imprisonment for eighteen months, and each to pay a fine of Rs. 1,000, or in default be rigorously imprisoned for a further period of three months.

Upon the 11th of June they, by petition, appealed to the Session Judge of Khándesh, the Honorable Mr. Hobart. That petition, amongst other objections to the validity of the conviction, alleged as follows:—

"We had engaged two *vakíls* in the Khándesh Adálat and brought them to Sultánpur to defend us before the Full Power Magistrate, but we were not allowed to communicate with them according to law. We were not able to give full information to our *vakíls* relating to the case, as it was

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ordered by the Magistrate that we should communicate with them in Maráṭhi in the presence of police inspectors. We were, therefore, not able to derive legal assistance from our *vakíls*, and were compelled to tell them to return without defending us." The 8th paragraph, which it will be perceived related to the prisoners Govind Náráyaṇ and Sái Narsáppá, was as follows:—"8. Moreover, we, Govind Náráyaṇ and Sái Narsáppá, further beg to observe that we were examined, and in our depositions have partially confessed to the truth of the charges preferred against us, but those our depositions are contrary to Sec. 203 of the Criminal Procedure Code, in the following manner:—

"1*st*—We both of us were arrested at Málligáṁ on the 28th of March, at 9 P.M. From that time up to the date of our examination we were in the custody of the police inspectors Hafizullá Manzullá and Náráyaṇ Kṛishṇa for more than a month and a half. 2*nd*—From the time of our arrest at Málligáṁ we were made to travel about four hundred miles, being obliged to follow the court of the Magistrate, on tour, and go to other places. 3*rd*—The causes of our confession are our being obliged to travel through fearful jungles, and our being subjected to hardships by the two said inspectors." (The Maráṭhi word rendered "hardships" in the original translation has been rendered by the Interpreter of this court "pain-producing or pain-causing circumstances.")

"As we were much weakened by our having been in the custody of the police for days and nights together, and by our having been compelled to travel from jungle to jungle and place to place, we, to extricate ourselves from this distressed condition, through sheer helplessness, deposed according to the instructions of the police, but contrary to our will, and contrary to the real circumstances of the case, before the Magistrate."

This petition concluded by stating that there were other grounds for appeal, which the petitioners, on obtaining copies of the papers in the case, would state in the course of the hearing of the appeal. That petition was signed by their *vakíl*, Kṛishṇáji Hari.

The Session Judge, on the filing of that petition, directed the Magistrate to forward the record of the proceedings

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before him to the Session Court, and also appears to have admitted the prisoners to bail.

During the hearing of the appeal before the Session Judge, the three appellants, through one of their *vakíls*, presented to the Session Judge a further petition, dated 18th July 1870, by way of supplement to their original petition of appeal to him of the 11th of June.

That supplemental petition, which has been at times during the argument somewhat inaccurately called a *darkhást*, is as follows:—

"To the Sessions Judge.

"SIR,—Your humble petitioners, Káshináth Dinkar, Govind Náráyaṇ, and Sái Narsáppá, beg to observe—

"1. That, according to the Penal Code, Sec. 201, it is necessary for the commission of the offence that the evidence against a third person should be made to disappear, which has not been done in this case.

"2. The Magistrate had no authority (jurisdiction) to investigate this case.

"3. According to Act II. of 1855, books, before they could be admitted as evidence, must be proved in a particular manner. As the books referring to this case were not proved in that manner, they could not be put in as evidence.

"4. There was a mistake in law in admitting Khándu Sing as a witness.

"5. It was a mistake to receive additional evidence in some places in this case.

"6. The following issues should be inquired into and determined after taking evidence—

"(*a*). *Whether the confessions of Govind Náráyaṇ and Sái Narsáppá were made* (*or occurred*) *against their will.*

"(*b*). Whether the police people accompanied all or some of the witnesses in this case on their way to the court. And whether, after their having come to give evidence, they were under the restraint of the police.

"(*c*). Whether there was any hindrance to private conversation taking place between the appellants and their *vakíls*.

"We humbly request that the evidence we may produce regarding these points may be admitted, and the case be decided accordingly.

"18*th July* 1870."

That petition was signed by two *vakíls* for the appellants, namely, Kṛishṇáji Hari and Vináyakráv Trimbak Gole.

Upon the same day (July 18th) the Session Judge refused to receive that supplemental petition as part of the proceedings in the appeal, but did not return it to the appellants or their *vakíls*. He indorsed upon it his reasons for declining to admit it upon record, as follows :—

"This petition cannot be admitted, because, when the *vakíl* is present, whatever information is required must be communicated verbally according to usage, and (as this is not done in this case) the petition cannot be received.

"G. A. HOBART,
"Sessions Judge.

"18*th July* 1870."

It would appear, however, from the Session Judge's judgment that every objection raised in that petition was in fact verbally urged before him on the hearing of the appeal, and he endeavoured in his judgment to answer each of those objections. Amongst the remarks of the appellants' *vakíl* which the Session Judge notices is this:—

"That this court (the Session Court) should make inquiries as to the manner in which Sái Narsáppá and Govind Náráyaṇ's admissions were taken." Immediately afterwards the Judge in his record makes this remark as to the supplemental petition :—

"The *vakíl* offers a written paper, which he requests the Court to have read. He is desired to state the contents, which he refuses to do. He gives no reason for his refusal, and, it being contrary to the practice of this court to receive *anything of this sort* from a *vakíl*, after receiving the written petition of appeal forming the ground on which the record of the trial is sent for, I reject this document."

It is very difficult to understand why the appellants' *vakíl* should have refused to state the contents of the supplemental petition, as the Judge has recorded him as having done. There does not appear to have been any passage in it which he need to have been afraid to read. The appellants,

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not having copies of the papers, when presenting their original petition, reserved to themselves by it the right to bring forward additional points of appeal afterwards. It was perfectly regular under such circumstances to do so by supplemental petition, and the Judge ought not to have rejected it. As regards the confessions, this petition merely suggests an issue as to whether they were made against the will of the appellants. We are almost led to the conclusion that the learned Judge and the *vakíl* must have misunderstood each other. For every objection and argument contained in the supplemental petition must have been put forward orally by the *vakíl;* the Judge has noticed each of them, and, amongst the rest, notices the impeachment of the value of the confession thus:—

"The objection that Sái Narsáppá's and Govind Náráyaṇ's admissionary statements at the trial are of no weight against them, as having been obtained by undue influence, is an objection which I must take to be based on untruth, for at the head of the examination of each of these accused the Magistrate has recorded a warning given them by him, that they need not answer any question he might put to them unless they chose. It seems to me clear that if they mean to insinuate that undue influence was employed by the Magistrate, it is an objection this court cannot entertain. It would be an imputation on the Magistrate of bad faith, into the truth of which it would be beyond the power of this court in this proceeding to inquire. There would be no finality in proceedings of this sort if the appellate court were to enter into such questions."

No doubt the learned Judge would be quite right in holding that the record of the Magistrate was, on the appeal to the Session Court, conclusive as to the fact that the Magistrate had warned the appellants that it was optional with them to answer the questions put to them or not. And it may be that the truth of the averment to that effect in the Magistrate's record could only be questioned in a proceeding against the Magistrate himself, by way of criminal information or some equivalent procedure in respect of malversation

in his office, because such a statement on record must, on appeal, be taken to import absolute verity. But it is quite a mistake to suppose that such an averment on record would preclude an inquiry on appeal to a Session Court into other circumstances under which the confession might have been taken. It is quite possible, notwithstanding that such a warning may have been given by a Magistrate, that the confessions, as evidence against the party confessing, may have been wholly valueless. For instance, a party may have been, at the time of confessing, intoxicated or insane, or under some temporary delusion, or the influence of fear engendered by previous maltreatment of the police or other persons, or induced to make admission by some reward or improper inducement previously held out to him. Allegations, made in a regular and proper manner to the Session Court, that a confession before a Magistrate was given under any such circumstances, should receive due attention and be inquired into, and if the Session Court were to refuse to make such inquiry it would certainly commit a very grave error in law and procedure. It is no legal answer to a demand for an inquiry upon such allegations that the Magistrate had warned the accused that it was optional with him to answer the questions put to him or not, although the fact that such a warning had been given would be a legitimate matter for comment by the prosecutor.

The Session Judge in this case, when he made the remark already extracted, "if they mean to insinuate that undue influence was employed by the Magistrate," &c., seems to have wholly lost sight of the original petition of appeal presented to the Session Court, which stated, not that they had been in any wise unduly influenced by the Magistrate, but that, after long travelling and fatigue, and being subjected to "pain-producing circumstances" by the inspectors of police, as recounted in that petition, they, the appellants, in order to extricate themselves from that distressing condition, "deposed according to the instructions of the police, but contrary to our (their) will, and contrary to the real circumstances of the case, before the Magistrate." The fact that the

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Magistrate warned them that it was optional with them or not to answer his questions, is not any answer to the allegation that they deposed in conformity with the instructions of the police, in order to escape from the hardships to which they had been subjected. The Judge should have made some inquiry into that allegation. Probably a succinct inquiry, judiciously conducted, would at that time have been quite sufficient to have ascertained how far the allegation was founded on fact. We are not unmindful that it is a painfully common practice in this country for prisoners, who have made full confessions before a Magistrate, as fully to retract them before the Session Judge, and to allege that their confessions have been made when those accused persons were in a state of terror and duress, and after they had been maltreated and tampered with by the police. Statements to that effect are often untruly made or grossly exaggerated, and their very frequency tends to harden the mind against their reception, so that such a retractation is, it must be admitted, most usually regarded with suspicion. Even although this is so, the constant iteration of such charges against the Native police is also suggestive of the probability that their recurrence would not be so continual were they at all times without foundation. It would be a most perilous doctrine for the subject, were this court to sanction the supposition that the retractation of confessions, and assertion of ill-usage as their producing cause, are so invariably untrue as to warrant Courts of Justice in rigidly closing their ears and refusing to entertain or investigate that assertion. Our experience, we regret to say, is not identical with that of Mr. Ashburner, who, on the inquiry (of which more hereafter) directed by the Second Division Court stated, in his evidence that within his experience a case of extorted confession has never been satisfactorily proved. Generally speaking, such a case is difficult of proof. But the records of the Sadr Adálat and of this Court bear melancholy testimony to the fact that such cases have been at times thoroughly established in proof, and also show that the perpetrators of torture and other malpractices have been duly punished.

The Session Judge, upon the 23rd of July, gave judgment against the three appellants upon all the points raised by them, and rejected their appeal.

Upon the 29th of September the same three persons caused a petition to be presented to the High Court.

That petition, after stating the conviction and sentence by Mr. Pritchard, and the affirmance of them by the Session Judge, proceeded to mention the points on which the petitioners sought a reversal of the convictions and sentences. Amongst those points was one that Mr. Pritchard had not jurisdiction as a Magistrate F. P. in Násik, and a general objection that he had not jurisdiction to try the case. They also objected that the Session Judge "received and used verbal, albeit unsworn, information from the Magistrate F. P. on some material points, such as whether the accused were not allowed properly to instruct their *vakíls*. It is also objected that the Session Judge "*refused to receive evidence on the point whether the confessions of Sái Narsáppá and Govind Náráyan were extorted or not*, and also whether the witnesses in the case were accompanied by police peons to the court or not;" and the petition next alleged that "*the confessions of Sái Narsáppá and Govind Náráyan were obtained by torture and deception.*" Its final allegation was that the petitioners could not be properly convicted under Secs. 201 and 109 of the Penal Code.

The three petitioners duly signed that petition, and respectively made solemn affirmation, in the presence of Mr. Edwards, a Magistrate F. P., to the truth of its contents.

That petition first came before my brothers Gibbs and Melvill. They, considering the question as to the jurisdiction of Mr. Pritchard such a point of law as *primâ facie* warranted the petitioners in applying to the High Court as a Court of Revision, on the 29th of September ordered that the record and proceedings in the case should be sent for.

They expressed no opinion upon the other points. If one plausibly good point of law is shown to the court before which a petition of revision first comes, the practice, in order

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to save time, has been to send for the record and proceedings, and to leave it to the petitioners to argue that, and such other points of law and procedure in the Division Court before which the record and proceedings eventually come, as may be raised by their petition.

The papers having been transmitted from Khándesh, the case was argued in the Second Division Court, on the 30th of November and 7th of December, before my brothers Lloyd and Kemball; Mr. Anstey and Mr. Shántárám Náráyaṇ appearing for the petitioners, and Mr. Gaṇpatráv Bháskar, on behalf of the Government Pleader (Mr. Dhirajlál Mathurádás), for the Crown. The only instructions which Mr. Gaṇpatráv Bháskar had were instructions prepared by Mr. Pritchard for the Government Pleader. Mr. Dhirajlál Mathurádás has given a sufficient reason for his non-attendance in that court upon those days, namely, that he was engaged in two other important cases for Government in the First Division Court. During the interval from the 29th of September until the 30th of November, there was not any affidavit filed in contradiction of the statement in the petition to the High Court, that "the confessions of Sái Narsáppá and Govind Náráyaṇ were obtained by torture and deception." There has been, we fear, too much laxity of practice at this side of the court on the part of Pleaders, in permitting important statements of fact in verified petitions to remain uncontradicted by oath or solemn affirmation, to admit of our saying more than that it would have been desirable that such an affidavit had been filed in this case previously to its coming before the Second Division Court. The allegation that the confessions were procured by torture and deception, being coupled with the objection that the Session Judge (who was bound to investigate the case, as well on the facts as the law, and was at liberty to take any fresh evidence which might be necessary) refused to receive evidence on the point whether the confessions of Sái Narsáppá and Govind Náráyaṇ were extorted or not, a Court of Revision could not avoid noticing the allegation that torture and deception had been used. Moreover, on the record of the case then before

it, there was the patent fact that the Session Judge had, on the appeal to him, declined—for a reason, as we have already stated, wholly insufficient in point of law—to investigate the circumstances under which the confessions were taken.

The Registrar's note, in pencilling, on the papers, stating the point of jurisdiction on which my brothers Gibbs and Melvill admitted the petition to the High Court, having been brought to the notice of my brothers Lloyd and Kemball, they ascertained from the former Judges that they had not made any order limiting the argument to the question of the jurisdiction of the Magistrate.

Accordingly, other points raised in the petition, as well as that point, were discussed before the Second Division Court, and, amongst them, whether the conviction was sustainable under Secs. 201 and 109 of the Penal Code, which the Second Division Court decided in the negative: being of opinion that—construing Sec. 201 with the aid of Secs. 202 and 203, which are *in pari materiâ* with it, and could not be supposed to impose upon a man a punishment for not giving information of an offence committed by himself—Sec. 201 could not have been intended to render a man punishable for causing evidence of the commission of an offence by himself to disappear; and if such making away with evidence of his own offence were not itself an offence, the abetment by him of making away with such evidence could not, under Sec. 109, be an offence. To the petitioner Káshináth Dinkar the Second Division Court gave the benefit of that opinion, and quashed his conviction and sentence. He had not made any confession of guilt; and that court considered that the evidence before the Magistrate, so far as it affected Káshináth Dinkar, did not show any other offence by him, upon which, under Sec. 426 of the Criminal Procedure Code, the sentence could be supported.

Returning to the argument before the Second Division Court on other points, we find that not only were the allegation of torture and deception, and that of the refusal of the Session Judge to inquire into its truth, strongly relied upon, but by oral statements, which the petitioner's counsel

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must have been instructed to make, and did make, it was imputed to the Magistrate that torture was inflicted upon the petitioners in his presence and with his sanction. That imputation was unsupported by affidavit either upon oath or solemn affirmation, and was alike unsupported by any statement in the record of the proceedings before the Magistrate himself, or before the Session Judge on appeal. It was, indeed, at first stated to the Second Division Court by the learned counsel, that the details of these tortures were set forth in the supplemental petition presented to, but rejected by, the Session Judge. But the learned counsel was under a misapprehension in that respect, and having, as we learn from himself, been informed by Mr. Shántárám Náráyaṇ, who came into court about that time, that the details were not set forth in that petition, the learned counsel withdrew or materially modified his statement that tortures were so set forth in detail—but (and we do not suppose that this was intentional) not with sufficient emphasis, or in a sufficiently marked manner to arrest the attention of the Second Division Court, which, accordingly, continued under the impression that the original statement remained unaltered. Even the learned counsel's own recollection that he had made the correction must have been far from vivid: for recently, when opening this case before us, he did so on the hypothesis that the supplemental petition did contain the details of the torture, until that petition was read to him by the court, and the circumstance of his having made the correction on the previous occasion at the suggestion of Mr. Shántárám Náráyaṇ was, apparently after a conversation with that learned gentleman, recalled to the memory of the learned counsel. The interval of three or four months may be sufficient to account for this.

No doubt, in obeying his instructions, by asserting that torture had been inflicted upon the petitioners in the presence and with the sanction of the Magistrate, the learned counsel could not have been influenced by any other or less worthy motive than the desire to perform his duty towards his clients. How great is the privilege of speech accorded by law to

counsel for the sake of his client, and for the sake of the public, is testified by authorities ancient and modern. In *Wood* v. *Gunston* (A.D. 1655) (*a*) it was said by Glyn, C. J., "that if a counsellor speak scandalous words against one in defending his client's cause, an action doth not lie against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." In *Brooke* v. *Montague* (*b*) the court said that counsel "hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question; and not to examine whether it be true or false, but it is at the peril of him who informs it; for a counsellor is, at his peril, to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action on the case lies against him, as Popham said; but matter not pertinent to the issue, or the matter in question, he need not deliver, *for he is to discern, in his discretion, what he is to deliver, and what not,* and, although it be false, he is excusable, being pertinent to the matter; but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable, for it shall be intended as spoken maliciously and without cause, which is a ground for an action." We are not to be understood as for a moment adopting Chief Justice Popham's dictum as to an action on the case lying against counsel if he do not put forward all of what his client may have informed him, and which is pertinent to the issue, any more than we adopt another dictum of the same learned Judge (irrelevant to the present question) at the close of the same case, to the effect that *Greenwood* v. *Prist,* there cited, is good law, it having been overruled in *Hearne* v. *Stowell* (*c*). The instructions of the client, if acted on by counsel, would often be more productive of injury than of benefit to the client. It must frequently have been within the experience of counsel in large practice, especially in this country, to have been instructed to make allegations, in themselves so vehemently improbable and inconsistent with the main facts, as, if made, would throw a cloud upon,

(*a*) Styles' Rep. 462. (*b*) Cro. Jac. 90. (*c*) 12 Ad. & E. 26.

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and irretrievably damage, an otherwise fair case. It would be absurd to maintain that counsel, who declined to carry out such suicidal instructions, laid himself open to an action for having thus exercised the discretion which unquestionably is intrusted to him. The rule as to the position of counsel is fully and satisfactorily laid down in two modern cases. The first is that of *Hodson* v. *Scarlet* (*d*), an action by an attorney against the defendant (afterwards Lord Abinger, C. B.) for slanderous words spoken by the latter as counsel in a cause. The court seemed to think that the remark containing them was too severe, being, as Lord Ellenborough, C. J., happily phrased it, an "expression" which, "in the exercise of a candour fit to have been adopted, might have been spared," but the court being also of opinion that it could not be said that there was no reasonable and probable cause for the words, and that they were relevant and pertinent to the cause in which they were spoken, held that the action could not be sustained. Bayley, J., observed that "these are not facts of a calumnious nature stated by the defendant, but are epithets attaching on the conduct of the plaintiff *from facts proved in the cause*. Holroyd, J., said: "The words were spoken in a case after the evidence was given, upon which they were a comment. The jury had heard the facts, and were capable of judging of the accuracy of the comment, which was made for the purpose of showing to them the view which the defendant took of all the circumstances which had appeared in that case. It is stated by Lord C. B. Comyn that "words which denote opinion or suspicion are not actionable." Here the words denote only the opinion of the speaker, and were addressed to the jury intending to convey to their minds the same opinion. I apprehend that a counsel is in the same situation and under the same protection as the party himself, with this exception, perhaps, that a party, from his comparative ignorance of what is, or is not, relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge of itself should be sufficient to restrain him within due

(*d*) 1 B. & Ad. 232.

bounds." After referring to the authorities, he proceeded thus:—"These cases show the privilege possessed by parties themselves, and from these authorities it appears that no action is maintainable against the party, nor, consequently, against the counsel, who is in a similar situation, for words spoken in a court of justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide*, or express malice be shown, then they may be actionable—at least our judgment in the present case does not decide that they would not be so." In all of the preceding cases the defendants were counsel, and the actions were for slander alleged to have been uttered by them. The last case, *Butt* v. *Jackson* (*e*), which we shall mention (and at which it was my good fortune to have been present as one of the audience), was an application on behalf of one of Her Majesty's counsel for leave to file a criminal information against an attorney, upon whose conduct the former, in his capacity as counsel, had animadverted strongly in another case, imputing to him the concoction of evidence to sustain an indictment, in return for which the attorney challenged the learned counsel to fight a duel. The argument (most unhappily not preserved in the report of the case) of Mr. Henn, Q.C., for the defendant, on the subject of the true limits of the privilege of counsel, has never been surpassed in excellence. It attracted much attention and admiration at the time (1846). The unanimous judgment of the Court of Queen's Bench in Ireland was delivered by one who himself had been an eloquent and independent advocate, and who, with high ability, filled in his lifetime more, perhaps, of the highest judicial offices than any other man has held. He was Master of the Rolls, Lord Chief Justice, Lord Chancellor, Lord Justice of Appeal, and again Lord Chancellor. The following passage extracted from the judgment of Lord Chief Justice Blackburn, of whom I have been speaking, lays down the rule in a manner which leaves nothing to be

(*e*) 10 Ir. Law Rep. 120, 123.

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desired:—"It belongs to every subject of this realm, in all Courts of Justice, to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegate; its nature and character is not altered by this delegation; it is still the same, to be exercised in the same manner and for the same purposes, and subject to the same limitation and control, as it would if the party were pleading his own cause. *These considerations will at once show the fallacy of the argument, that instructions to counsel are the test by which we should try whether or not the line of duty has been passed; no instructions can justify observations that are not warranted by facts proved, or which may legally be proved;* and it is the duty of counsel towards their clients to use their own judgment and experience and discretion; and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right, when duly exercised and directed to its proper purposes, should not be fettered or impeded; for if it be, an injury is sustained, not by the advocate, but by the client, and not by the client alone, but by the whole community, whose interests are inseparably connected with a right essential to the administration of justice."

Keeping in view the principles thus laid down, and bearing in mind that the first petition presented to the Session Judge went no further than to assert that the petitioners had been subjected to "pain-producing circumstances" by the police, and did not contain the slightest suggestion that this was done, or that torture was practised upon them, with the knowledge or sanction of Mr. Pritchard; recollecting also the total absence of any assertion in the argument of the petitioners' *vakíls* before the Session Judge, so far as it is embodied in his judgment, that Mr. Pritchard was

any party to torture, and the equally profound silence on the same point of the petition presented to this court (then and now sitting merely as a Court of Revision), anxious as we are to uphold to its utmost legitimate extent the privilege of the advocate, we do not think that we infringe upon it by saying that the learned counsel for the petitioners (albeit influenced by no other or less worthy feeling than that of zeal for his clients) would have exercised a sound discretion if, before he suffered himself to be made the medium for bringing a most grievous charge against the character of a Magistrate, he had required of those instructing him some statement on oath or solemn affirmation in support of the allegation that the Magistrate was present at, and concurred in, the acts of torture imputed to the police—something, in fact, to afford a reasonable ground for supposing that the charge might be legally proved, for previously proved or even suggested it most certainly had not been. And at all events we think that it behoved the learned and eminent counsel to hesitate in persisting in the charge without some such support, when he was informed by the learned Pleader with him that he (the learned counsel) was in error in supposing that the supplemental petition presented to the Session Judge contained details of any such torture. The administration of justice by the courts or the magistracy should not be assailed on light grounds, and he who does so impeach it, renders no good service to the country or his client.

Before referring to the decision of the Second Division Court, it should be observed that, at the close of the arguments on the 7th of December, the allegation of the petitioners, in their petition to the High Court, that torture and deception had been practised upon them by the police in order to procure admission of guilt, remained undenied upon oath or solemn affirmation, and that it was not, and could not be, denied that the Session Judge had refused to investigate the truth of that assertion, and had so refused for a reason wholly insufficient in law. Under these circumstances, where the charge that the confessions (and, consequently, the pleas of guilty) upon which the convictions were based had been

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procured by torture, remained, legally speaking, uncontradicted, and, beyond all doubt, uninvestigated, the very least that the Second Division Court could do, in order to remedy so grave an error in law as that committed by the Session Court, was to direct an inquiry into the truth of the charge. What the legal form of that inquiry should be, may be a question of some nicety. The following reason appearing in the judgment of the Session Judge for his having overruled the objection of the appellants, that they had not been allowed free access to their *vakils*, namely:—"The trying Magistrate has, *since the hearing of the appeal*, verbally informed me that the assertion is entirely false to his own personal knowledge, which I take to be conclusive on the question;" and other allusions to personal communications between the Session Judge and the Magistrate appearing in the judgment of the former, the Second Division Court directed the Registrar to inquire what the nature of these communications was, and whether they were in the presence of the Pleaders for the appellants, or were at a subsequent period, or when. In reply to the Registrar's letter of the 8th of December, the Session Judge, by letter of the 12th of December, stated that these personal communications were partly verbal during the hearing of the appeal, the Magistrate sitting beside him, and partly by private note subsequently to the hearing.

On the 16th of December the Second Division Court gave its judgment. After referring to the conviction and sentence by the Magistrate, and the appeal to, and rejection of it by, the Session Judge, and the application for the exercise of the extraordinary jurisdiction of the High Court as a Court of Revision, and after stating that "amongst the grounds urged in their petition" to the High Court, the one which took precedence in the argument of counsel for the petitioners was, that they could not be convicted under Secs. 201 and 109 of the Penal Code, the Second Division Court, for the reasons already mentioned, quashed the conviction of, and sentence upon, Káshináth Dinkar, and expressed its regret that the case had not been intrusted to the Advocate General or some other law officer of the Crown for argument. As to Sái Nar-

sáppá and Govind Náráyaṇ the judgment proceeded thus:— "With regard to the other two convicts, the case, however, is quite different; for we have on record express admissions, contained in their examinations before the Magistrate, of various particular frauds perpetrated by them. But a great deal has been said in the course of the argument with respect to undue influence having been exercised, to induce Govind Náráyaṇ and Sái Narsáppá to confess their guilt; and indeed the learned counsel for the prisoners *has not hesitated positively to assert* that cruel and revolting practices were resorted to, in the presence and with the approval of the trying Magistrate, to extort their confessions, and that subsequently the prisoners were debarred from free intercourse with their *vakíl. The details of this abuse of authority are alleged to have been set forth in a written paper presented at the hearing of the appeal,* but which the Session Judge declined to recevie. In his minute, Mr. Hobart says he would not receive a written statement offered by the *vakíl* because he refused to state the contents of it, and 'it was contrary to the practice of his court to receive anything of this sort from a *vakíl.*' It is alleged that the Session Judge was aware of the contents of the document, but whether he was so or not, considering the circumstances of the case, Mr. Pritchard being in the position of prosecutor as well as trying Magistrate, we do not think he exercised a sound discretion in declining to receive it. However, looking to the complexionthe caso now bears, it becomes absolutely necessary, to enable us to dispose finally of the appeal, that the circumstances under which the admissions were made should be investigated and reported to us. *The Session Judge is, therefore, directed to send for the said two convicts, and, after calling upon them to give on solemn affirmation a detailed statement of the undue influence practised upon them, to inquire fully into their complaint, giving the Government Prosecutor due notice of the investigation, and, after recording the evidence, together with his opinion thereon, to forward it to this court."*

The court then made some *obiter dicta,* leaning to the opinion that Mr. Pritchard had not jurisdiction in the new

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collectorate of Násik, but under the special circumstances of the case the court did not think that the question as to jurisdiction in Násik interfered with the convictions of Sái Narsáppá and Govind Náráyaṇ, and reserved its opinion on the other points until the case should be returned for final disposal after the holding of the inquiry directed.

On or about the day on which the judgment was given, Mr. Dhirajlál Mathurádás, in Chamber, preferred a request to my brothers Lloyd and Kemball, to expunge from their judgment the passage expressing their opinion that the Advocate General or other law officer of the Crown ought to have been employed in the case, but that request was refused. No other application to vary that judgment in any respect has ever been made to them.

That judgment shows, as the fact was, that the Second Division Court remained under the original impression communicated to it by the learned counsel for the petitioners, namely, that the details of the alleged abuse of authority by the Magistrate and police in the extortion of confessions were set forth in the supplemental petition presented to, and rejected by, the Session Judge, and hence the special introduction into the judgment of Mr. Pritchard's name with respect to that alleged extortion. Although that allusion to Mr. Pritchard is cautiously made, being preluded by the words "and indeed the learned counsel for the prisoners has not hesitated positively to assert," &c., and the supplemental petition is referred to as *alleged* to contain the details; and in the part of the judgment directing the inquiry Mr. Pritchard is not mentioned; still as the supplemental petition was not then before the Second Division Court, having been detained in Dhuliá by the Session Judge, and up to that time had not been placed amongst the papers in the case, and as there was not any affidavit implicating Mr. Pritchard, my brothers Lloyd and Kemball are of opinion that the special allusion to Mr. Pritchard ought not to have been then made, and in that opinion the other members of this court concur.

The inquiry was made at Dhuliá by the Session Judge, and the proceedings taken under it, together with his report, have

been returned to, and are now before, this court. The pith of his report is in the concluding part of it, and is as follows:— "In certifying to the High Court the evidence taken and recorded, I shall express my opinion to this effect—namely, that beyond the fact of Govind Náráyaṇ and Sái Narsáppá being, at other times than when brought before the Magistrate during their trial, occasionally kept handcuffed, it has not been proved that either Govind Náráyaṇ or Sái Narsáppá was in any way harshly treated, still less subjected to torture. I am of opinion that the evidence shows that the Magistrate was aware that Govind Náráyaṇ and Sái Narsáppá were so kept handcuffed, and that he does not appear to have interfered to prevent it; and I think it is to be regretted that this restraint was imposed on Govind Náráyaṇ and Sái Narsáppá, because there is nothing to show that either of them was so conducting himself as to make such restraint necessary." Mr. McCulloch, who appeared before us on behalf of the Crown, sought to object to the use of any of the evidence taken in the inquiry, on the ground that the inquiry had not been directed in a proper form, namely, that the High Court could not, having regard to Secs. 204 and 373 of the Criminal Procedure Code, lawfully direct that the petitioners should be examined upon solemn affirmation; and that, having been so examined, their depositions then made were not legal evidence for any purpose whatsoever. It may be that the words "accused person" used in these sections would be applicable to convicts examined under an inquiry directed (in the case in which the conviction has been made) by a Court of Revision, and that, consequently, the objection would have been good if taken in time; but whether it would be so or not, it was not, and is not, necessary for us to give, and we do not offer, any opinion, because we are quite satisfied that the objection was made too late, and has been completely waived on behalf of the Crown. No objection was made to the form in which the Second Division Court directed the inquiry at the time—although the Crown was then represented by a Pleader, Mr. Ganpatráv Bháskar. During the inquiry Mr. Pritchard appeared on behalf of the Crown, and, so far from making any objection to Go-

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vind Náráyaṇ and Sái Narsáppá giving their evidence on solemn affirmation, claimed and exercised the right to cross-examine them, and thereby availed himself of the order of the Second Division Court, and obtained for the Crown a privilege which it could not have had unless the petitioners had been put on solemn affirmation. When he himself was about to be examined, he insisted on being regarded as an accused person, and that, therefore, he ought not to be sworn; and his objection was properly overruled, as he was not in any legal sense an accused person; but he never made any objection whatsoever, nor did the ordinary public prosecutor, or anybody else, object to the examination of Sái Narsáppá and Govind Náráyaṇ upon solemn affirmation. In the case of *Birch* v. *Sir William Somerville* (*f*), the Earl of Clarendon, the Lord Lieutenant of Ireland, was examined as a witness on behalf of the plaintiff. The Registrar of the Court administered to the Earl of Clarendon the attestation on honour instead of the usual form of oath. He was examined and cross-examined, and the admissibility of his evidence was unquestioned, until, after a verdict for the defendant, a motion was made to set it aside, on the ground of the evidence having been illegally taken without the sanction of an oath. It was admitted on behalf of the defendant that a Peer of the Realm must be sworn in an action between party and party, if so required, but it was contended that the objection came too late. The Court of Queen's Bench in Ireland was of opinion that the objection would have been good if made in time, but held that it was made too late, and that the plaintiff must be considered as having acquiesced in the taking of the evidence without oath. Several English cases were cited by counsel in that case to the same effect, and in the present case not only has the Crown not made any objection until the matter came up here, but has, independently of the question of lateness, lost its right to object, because it has founded prosecutions, against both Sái Narsáppá and Govind Náráyaṇ, upon the depositions made by them before the Session Judge upon the inquiry—prose-

(*f*) 2 Ir. C. L. Rep. 143.

cutions for giving false evidence, and thus completely waived the objection. The Crown is bound by its conduct in the matter, although it may well be that the prisoners would not be so. It is not for their interest to object, but quite the contrary; and they, accordingly, insist, as under the circumstances they are entitled to insist, upon using the depositions.

The appointment of Mr. Pritchard as Crown Prosecutor, he having been the Magistrate who tried the case, was a most improper and singular proceeding. To convert a judge into an advocate seeking to uphold his own decision before another tribunal, is, so far as we know, at least in the annals of British jurisprudence, quite unprecedented, and most objectionable, as he has a personal interest in the case, which a public prosecutor should not have. However, looking to the serious reflections upon Mr. Pritchard's character contained in the order for the inquiry, and to the fact that the Judge at first declined to allow him any *locus standi*, and suggested that, in order to obtain one, Mr. Pritchard should be appointed public prosecutor, we are not disposed to severely censure his acceptance of the office proposed for him by the Judge. But we are astonished that the Judge should have done so, and regret that Mr. Ashburner, the Magistrate of the District, should, by making the appointment, have acted on the Judge's proposal. Having accepted the office, Mr. Pritchard ought to have endeavoured to perform its duties with that calmness and impartiality which should ever characterise a public prosecutor. It has been well said by a learned Judge: "The counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the court in the furtherance of justice, and not to act as counsel for any particular person or party" (*g*). He should not by statement aggravate the case against the prisoners (*h*), or keep back a witness because his evidence may weaken the case for the prosecution. His only object should be to aid the court in discovering truth (see per Vaughan, J., 9 C. & P. 23). A public prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side.

(*g*) 8 C. & P. 269. (*h*) Hayes' Crim. Law, 874.

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There should be on his part no unseemly eagerness for, or grasping at, conviction. We deeply regret that Mr. Pritchard should so far have forgotten his duty towards the prisoners, the public, and this court, as to apply to the Session Judge (not only before the result of the inquiry was made known to this court, and the case finally disposed of by it on the evidence then and previously taken, but before the inquiry itself had nearly terminated) for permission to prosecute, before an inferior tribunal, Govind Náráyaṇ, Sái Narsáppá, and one of their witnesses, Khaṇḍu Sing, in respect of the evidence given by them, and the truth of which was to be considered by this court. But again we are more surprised and more grieved to find that the Session Judge so little knew his duty as to grant that permission. The inquiry commenced on the 10th of January. On the 21st of January the sanction to prosecute Govind Náráyaṇ was applied for and given. On the 23rd of January the sanction to prosecute Sái Narsáppá and Khaṇḍu Sing was applied for and given. On the 26th of January they all three were committed for trial by Mr. Edwards, Magistrate F. P., on charges of giving false evidence. The Session Judge—without, as he has since admitted, any lawful authority in that behalf—fixed a special session for their trial, and upon the 27th of January, accordingly, Govind Náráyaṇ was tried. The Session Judge had actually adjourned for one or more days the inquiry directed by the High Court, in order to facilitate the prosecution, and to allow Mr. Pritchard to attend at it. Such proceedings as these are not creditable to the administration of justice.

The witnesses for the petitioners, on the inquiry, had all been examined before the sanction to prosecute Govind Náráyaṇ had been applied for. Such witnesses as were subsequently examined were for the Crown. We consider it quite as objectionable to take any step likely to intimidate a witness for the Crown into giving strong evidence on its behalf, as to intimidate a witness for the prisoner so as to induce him to weaken his evidence for the latter. As already intimated, in order to prevent any injury arising to the

petitioners from the course adopted, we decline to take any notice of the evidence of Native witnesses for the Crown, examined at the inquiry after the sanction to prosecute Govind Náráyaṇ was given. They were persons of a class very likely to have been intimidated by the course adopted by Mr. Pritchard.

Further, assuming, but not deciding, that the Session Judge had power to sanction prosecutions, in respect of evidence taken upon an inquiry such as that in this case directed by the High Court, he has so improperly and illegally exercised that power, that we quash the sanctions given by him so far as they regard Sái Narsáppá and Khandu Sing, the papers having been duly sent for and brought before us for that purpose. We do not quash the sanction in the case of Govind Náráyaṇ, as to do so might deprive him of such benefit (if any) as he may derive from his acquittal by the Assistant Judge.

After rejecting the evidence of Native witnesses for the Crown, taken subsequently to the sanction of the prosecution of Govind Náráyaṇ, we have considered the other evidence taken upon the inquiry, including all of that taken for the petitioners, and we have also considered the evidence upon which the petitioners were convicted, and the various petitions presented in the case in all of the courts into which it has been brought. There have certainly been irregularities in the inquiry, and did we think that any further inquiry was likely to benefit the petitioners, we should not refuse it to them. It has not, however, been alleged, either at the inquiry or since, that the petitioners have been prevented from examining any persons whom they wished to call as witnesses, and their case had been completely closed by their counsel, Mr. Bálá Mangesh Wágle, and the case for the Crown had commenced before the sanction to prosecute Govind Náráyaṇ was given. We do not see any ground, howsoever slender, for supposing that any further inquiry could benefit the petitioners, or that we should benefit them by quashing that which has taken place and directing a fresh inquiry. It is sufficient for this court, when invited to

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exercise its jurisdiction as a Court of Revision, under such circumstances as we have here, if, notwithstanding any irregularities which may have taken place, its conscience is satisfied that the petitioners have had a full inquiry so far as they are concerned, and could not be benefited by further investigation.

We agree with the Judge in thinking that the petitioners have failed to prove that their confessions and pleas of guilty were the result of torture or undue influence. We do not purpose now to go into the details of the evidence and of the case, but only to notice leading facts. The petitioners themselves gave evidence of maltreatment by the police in order to induce them to confess, and that the police tutored them to say what they did say before Mr. Pritchard, and have produced some other witnesses to support them as to maltreatment. The police have been examined, and deny that they in any way maltreated the petitioners. There being this conflict of evidence, we must look to established and admitted facts, and the fair inferences from them. Viewing the confessions themselves, made upon the first occasions on which the petitioners were examined by Mr. Pritchard, when they made their most important statements, these confessions appear to us to be probable and natural, and not like a concocted tale put into the mouths of the parties by the police or others. Further, the petitioners made no complaint to Mr. Pritchard of having been tortured by the police on being brought to him, and they seem to have been ready enough to complain to him when inconvenienced by the police in preventing their servants from cooking for them. Again, one of them was examined by Mr. Ashburner, to whom, in the presence of Major Probyn, the same tale as was told to Mr. Pritchard was repeated. Major Probyn, too, took the very proper precaution of excluding the police from the room during the examination. No complaint of torture or undue influence was then made to Mr. Ashburner or Major Probyn. Nor did the prisoners complain to Dr. Bainbridge, the Jail physician, that either of them had been beaten or tortured by the police. In fact, until they presented their first petition of appeal to the Session Judge, nothing was said on the subject of ill-usage,

and then only in a mild form, such as long travelling through jungles, and "pain-producing circumstances," and tutoring, to which they said they were subjected by the police. In their supplemental peittion, the only passage which sounds in torture is a request for an issue as to whether their confessions were made or taken against their will. It is not, in fact, until their petition was presented to the High Court in September that there was a positive allegation of torture. They there speak of torture and deception as the means by which they were compelled to confess. Through their counsel in November and December they first put forward the most heinous charge—that Mr. Pritchard was present at, and consenting to, their torture. They obtain an inquiry, and do not themselves attempt to give, or produce any other person to give, so much as a scintilla of evidence to support the assertion, that Mr. Pritchard was a party to the cruel and revolting practices attributed to him and the police. This circumstance alone would go far to discredit their case, but, taken with the others, satisfies us that we cannot place any reliance even upon what they have said with regard to the police alone.

As to their being prevented from communicating with their *vakíls* when in Mr. Pritchard's camp, we have come to the conclusion, upon the evidence, that this is not true, and that their negotiations with the *vakíls* were broken off, either because they felt that after confessing they had no need for professional services, or because they could not come to any agreement with the *vakíls* as to the terms of their remuneration. We think it right here to say that, although it is quite proper that sufficient means should be adopted to prevent prisoners from escaping, when holding an interview with their *vakíls*, police or other persons should not be placed sufficiently near to overhear their conversation. We regret to find in his own evidence that Mr. Pritchard permitted himself to charge the *vakíls* with coming to his camp to tout for clients—a taunt which should not, under the circumstances, have been uttered by a Magistrate. The *vakíls* had been sent by the friends of the accused. We further regret

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to learn from his own evidence that Mr. Pritchard applied an opprobrious epithet to the prisoners or one of them. A Magistrate who thus comports himself towards persons brought before him for trial, and towards their professional advisers, must not be surprised if unpleasant opinions are expressed as to his mode of executing his office.

We do not perceive that there was any necessity for causing the petitioners to be conveyed from place to place, for a period of about six weeks, for long distances, at the hottest season of the year, or why Mr. Pritchard should not have tried them at one place. We see no reason for differing from the opinion of the Judge, who held that the petitioners were more frequently handcuffed than was necessary. They do not belong to castes physically formidable or violent, and do not appear to have attempted to escape from their guards either by means of force or corruption.

It was contended for Sái Narsáppá and Govind Náráyaṇ that they were entitled to the benefit of the point of law decided in favour of Káshináth Dinkar, in Secs. 201 and 109 of the Penal Code. For the Crown, however, it was argued that, although it may be true that the abetment of the destruction of evidence of a man's own crime may not be an offence, yet that here the books destroyed were not only evidence of the crime of themselves, but also of the crime of others—for example, of Sháligrám and their other accomplices. The point is one of some difficulty, but it is not necessary that we should determine it, as we think that, in the confessions of Sái Narsáppá and Govind Náráyaṇ there is copious evidence of their abetment of cheating by Sháligrám and others, and thereby inducing the delivery of property, against Sec. 420 and Sec. 109 of the Penal Code, and the punishment awarded to them by Mr. Pritchard (which we think to have been a fair and moderate one) does not exceed that to which he had power to sentence them for abetment of cheating, and thereby inducing the delivery of property; and, therefore, under Sec. 426 of the Criminal Procedure Code, a Court of Revision or of Appeal could not properly interfere with the sentences already passed.

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But it was further said that the abetment by one of the petitioners (Govind Náráyaṇ) of cheating (if any) took place in the Násik collectorate, and that Mr. Pritchard had no magisterial jurisdiction in Násik, and, therefore, that the conviction and sentence of Govind Náráyaṇ, at least, must be set aside. It is perhaps not very clear on the evidence as to whether the cheating abetted by him, or the abetment of it, took place in Násik or in Khándesh, but it is unnecessary for us to determine positively in which of the two collectorates these offences or either of them was committed; inasmuch as we think that the order of Government of the 19th July 1869, which appeared in the *Bombay Government Gazette* of the 20th of July 1869, and which is as follows:—"All persons who, as holding office or resident within the portions of the Khándesh and Ahmednagar collectorates which have been transferred to the Násik collectorate, have been vested with all or any of the powers of a Magistrate or Subordinate Magistrate, or with special powers conferred under any law, shall continue to exercise the same powers in the Násik magisterial district. By order of the Right Honorable the Governor in Council. (Sd.) C. GONNE, Secretary to Government"—conferred the authority of a Magistrate, F. P., on Mr. Pritchard in the new collectorate of Násik, he then (19th July 1869) being within the terms of that order, as holding office in the portion of the Khándesh collectorate which was transferred to the Násik collectorate, and vested with the powers of a Magistrate, F. P., in Khándesh. He continued for some time afterwards to hold his office of Assistant Collector, and although subsequently his performance of duties as a revenue officer was limited to Khándesh, yet he never was divested of the magisterial powers in the new collectorate of Násik conferred upon him by the order of the 19th of July 1869. There certainly is the difficulty at first felt by my brothers Lloyd and Kemball as to the position of the Collector and Magistrate of the district of Khándesh with respect to Násik, but it is not, we think, so great as to induce us to cut down the language of the order, which is sufficient to confer the magistracy, F. P., upon Mr. Pritchard, circumstanced as he then was.

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For the foregoing reasons, we decline to interfere with the convictions of, and sentences upon, Sái Narsáppá and Govind Náráyaṇ.

It remains for us to say a few words upon the petition presented by Mr. Shántárám Náráyaṇ on behalf of Mr. Anstey, who was summoned from Bombay as a witness on behalf of the Crown, on the application of Mr. Pritchard, to the inquiry at Dhuliá before the Session Judge. Mr. Shántárám Náráyaṇ was also summoned, and attended. Mr. Anstey was only served with the summons in Bombay on the day before that named for his attendance in Dhuliá, so it would not have been possible for him to reach Dhuliá at the time appointed. The application for his attachment for disobedience to the summons was made by Mr. Pritchard, but rightly refused by the Session Judge. It is to be inferred from the original application for the summonses to these gentlemen, which was not only *ad testificandum*, but also that they should bring with them their briefs and instructions, &c., and, from the nature of the examination of Mr. Shántárám Náráyaṇ by Mr. Pritchard, that the object of the latter gentleman in serving out the summonses was to ask for a discovery from Mr. Anstey and Mr. Shántárám Náráyaṇ of the instructions given by their clients, the petitioners, to them. Now such instructions the counsel, attorney, or pleader is not at liberty to disclose without the consent of the client, and such a consent could not be rightly sought for or accepted from accused persons. Sec. 24 of Act II. of 1855, referred to by Mr. McCulloch as being sufficiently vague to justify Mr. Pritchard in supposing that the latter part of it entitled him to say that by giving evidence the petitioners had waived their privilege, most clearly applies to civil proceedings only, the word "a suit" never being applicable to a criminal proceeding. We are not prepared to controvert with much earnestness the opinion expressed by the Session Judge, when refusing the application of Mr. Pritchard for an attachment of Mr. Anstey, that the summonses were originally applied for merely for vexatious purposes,—a measure which, if intended to be retaliatory on the

part of a public prosecutor and a magistrate, we must regret, although it cannot be affirmed that it was without serious provocation. The privilege is well known, and existed long before Act II. of 1855 was passed, or the Legislature which passed it came into existence. It may not be inappropriate to mention here that in *Dicas* v. *Lawson* (*i*), a rule for an attachment against Lord Brougham for a contempt of the Court of Exchequer in not appearing as a witness, in pursuance of a subpœna, was refused, the affidavit not showing how his evidence could be material, and the fact being that it could not have been material. Lord Abinger, C.B., said the court would not grant an attachment, or allow its process to be used, for purposes of needless vexation. We think that the Session Judge ought, before issuing the summonses, to have ascertained from Mr. Pritchard for what purpose he needed the attendance of witnesses from so great a distance as Bombay, and, if not satisfied that they were legitimately required, to have refused to issue the summonses.

The Original Jurisdiction Side of the High Court, in this respect following the practice of the Supreme Court, never allows a subpœna to issue into the Mofussil without the special permission of a Judge, which is not given unless fair reasons be shown to him for supposing that the attendance of the proposed witness is necessary. Sir M. Sausse once imprisoned an attorney's clerk for a fortnight for having obtained in Bombay, and caused to be served in Alíbág, subpœnas without the permission of a Judge, and in defiance of the general rule of court, which renders such permission indispensable, whereby some very poor persons were brought to Bombay and detained for a long time. In a criminal case when the witness is needed for the defence, the Judge, of course, is cautious not to refuse the subpœna if anything like a fair reason be shown for the attendance of the witness.

Lastly we should observe, with reference to circumstances mentioned in the record in this case, that it is not desirable that Magistrates whose decisions are under appeal, or who have been engaged in promoting the prosecution, or officers of police concerned in the case, at the hearing should sit

(*i*) 1 C. M. & R. 934.

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beside or near the Judge, or should converse with him, and we consider the verbal communications and notes which passed between the Magistrate and the Judge in this case highly irregular, and, if such a practice be persisted in, as calling for serious action. If there be any fact supposed to be in the knowledge of the Magistrate and which the Judge considers necessary for the proper determination of the case before him, he should examine the Magistrate as a witness, upon oath or solemn affirmation, according to his creed.

My brothers Melvill and Green, who are engaged in other Division Courts to-day, as well as my brothers Lloyd and Kemball, concur in this judgment.

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NOV. 23.

Report of Subordinate Magistrate—Credible Information—Evidence of a Breach of the Peace being likely—Security to keep the Peace—Crim. Proc. Code, Secs. 280, 287, *and* 288.

The report of a Subordinate Magistrate, although it is credible information on which a Magistrate of the District would be justified, under Sec. 280 of the Code of Criminal Procedure, in issuing a summons, is not evidence on which he can properly arrive at a conclusion that the accused is likely to cause a breach of the peace.

Secs. 287 and 288 of the Code require that evidence in such a case shall be recorded, and if none is forthcoming security to keep the peace should not be demanded.

THE accused were ordered by the District Magistrate of Dhárwár, E. P. Robertson, to enter into a personal recognisance to keep the peace, and in addition to give securities. This order having been confirmed by the Session Judge, Baron DeH. Larpent, this application for the Court's extraordinary jurisdiction was made.

The circumstances under which the order was made are briefly these.

In the little village of Lakundi, in Táluká Dambal, an annual fair is held in honour of a deity, whose car is on that occasion drawn by the inhabitants and paraded through the streets. A small faction, lately sprung up in the village, and represented by the accused, having objected to the procession going by the usual route, the Subordinate Magis-