

[APPELLATE CRIMINAL JURISDICTION.]

1873.
December 17.

REG. v. AMRITA' GOVINDA'.

Confession—Code of Criminal Procedure, Sections 45, 122, 256, 280, and 346—Indian Evidence Act, Secs. 30, 91—Abetment—Indian Penal Code, Sec. 114—Joint trial—Trial by Jury—Admission of improper evidence—Retrial.

A confession, not taken in the form of question and answer, and not authenticated by the Magistrate's endorsement as to its accuracy, is inadmissible in evidence, even though no objection should be made to its reception: Secs. 45, 122, 256, and 346 of the Code of Criminal Procedure and Sec. 91 of the Indian Evidence Act.

If an abettor of a crime is, on account of his presence at its commission, to be charged under Sec. 114 of the Indian Penal Code as principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence is not committed with his continuing abetment. The confession of a person who says he abetted a murder but withdrew before the actual perpetration of that murder by his associates, cannot be used as evidence against those associates though the person confessing is tried with them jointly on a charge of murder: Section 30 of the Indian Evidence Act.

If, in a case tried by a jury, the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court may reverse the conviction and sentence, and order a new trial: Sec. 280 of the Code of Criminal Procedure.

THE accused were tried by Baron Larpent, Session Judge of Puna, and a jury, for the offence of murder, and sentenced each to transportation for life.

The appeal was heard by WEST and NA'NA'BAI HARI'DA'S, JJ.

Leith (with him Shántarám Náráyan) appeared for the appellants.

Mayhew, Legal Remembrancer (with him Dhirajlál Mathurádás, Government Prosecutor) for the Crown.

The facts, in so far as they are material, appear from the following judgment of the Court:—

WEST, J. :—Exception has been taken by the appellants' counsel to the confessions of the prisoners, Bápu and

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 selves, respectively, but as matter for consideration against
 the other accused under the Indian Evidence Act 1872,
 Sec. 30. First, with regard to the alleged confession of the
 prisoner Bápu, which is annexed to the record, it is objected
 (1) that it is inadmissible even as against himself, because
 it has not been taken by the Third Class Magistrate in due
 form as provided by Secs. 45, 122, and 346 of the Code of
 Criminal Procedure, inasmuch as it is not recorded in the
 form of question and answer, and is not completed by an
 indorsement under the hand of the Magistrate to the following
 effect: "I believe that this confession was voluntarily made;"
 (2) that its purport does not amount to a confession of
 crime on his own part, and is not, therefore, liable to be
 used against the other accused; and (3) that the confession
 has been extorted by undue influence. It is not necessary
 to deal with the two last mentioned objections, if the first
 be sufficient to exclude the evidence in question from the
 record. It is allowed on behalf of the Crown that the con-
 fession is informal; but it is contended that it was admitted
 on the record without objection in the Lower Court as sup-
 plemented and rectified by the evidence of the Third Class
 Magistrate who was examined as a witness, and who stated
 that the prisoner duly made the statement recorded. We
 hold, on the authority of the decision of a Full Bench of
 this Court in the case of *Reg. v. Bai Ratan (a)*, that
 the statement in question is inadmissible. The conten-
 tion on the ground of waiver cannot be allowed to
 prevail in a criminal case. Under Sec. 256 of the Criminal
 Procedure Code, it is left to the discretion of the Judge to
 prevent the production of inadmissible evidence, whether it
 is, or is not, objected to by the parties; and it is the duty
 of this Court to see that this judicial discretion is exercised
 in a proper manner. We are of opinion that the very terms
 of the clause at the end of Sec. 346 show that the confession
 of the prisoner, Bápu, is not admissible. This confession has

(a) Ante p. 166.

not been taken in the course of a " preliminary inquiry." The Third Class Magistrate had no power to hold, and was not engaged upon, any such inquiry. His evidence cannot cure the defects which appear in what is provided for by the law as a species of pre-appointed evidence, and which the law declares to be complete and admissible only when certain forms are complied with in the recording of it.

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We come next to the alleged confession of the prisoner Krishná, which is also annexed to the record. This was recorded by the committing Magistrate, and no objection is raised against it on the ground of informality. It is objected to on the ground that, on a fair construction of it, it is not a confession at all of the crime by the accused on his own part, and that whilst, even if used against him, it cannot fairly operate to his prejudice, it cannot be taken into consideration at all against the other prisoners, jointly tried with him, under Act I. of 1872, Sec. 30. In support of this contention, two cases have been cited at the bar, viz., *Reg. v. Mohesh Biswas (b)* and *Rég. v. Belat Ali (c)*.

It appears from Sec. 30 of the Indian Evidence Act that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some others of such persons, is proved, the Court may take into consideration such confession as against such other persons, as well as against the person who made it. It is requisite, then, in order to such use of a confession as is here contemplated, that there should be a joint trial for the same offence. Suppose *A* is charged with murder, *B* with abetting the murder, and *C* with concealing evidence of it, so as to screen the offender; and *C* confesses to the offence charged against him. We think that, in such a case, although the three accused are jointly tried, it is not a joint trial for the same offence; and, therefore, the confession would be inadmissible except against *C* himself. Here, however, there is one offence charged against all the

(b) 19 Calc. W. Rep. Cr. R. 16.

(c) I bid 67.

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prisoners. We have, therefore, next to consider whether this is a confession within the meaning of the section. We have come to the conclusion that it is not. The Legal Remembrancer has contended that this is such a confession, because the prisoner has stated in it that, in pursuance of a previous arrangement, he went forth with the rest whose common object was, if not to kill, at least to beat the deceased ; and that he was present at the commission of the offence—facts which are sufficient to constitute his guilt that of a principal under Sec. 114 of the Penal Code. But if an abettor of a crime is, on account of his presence at its commission, to be charged as a principal, his abetment must continue down to the time of the commission of the offence. At any time before that event he may change his mind, and withdraw from the abetment. The law allows a *locus penitentiæ* in such cases; and, if he distinctly withdraws at any moment before the final act is done, the offence is no longer committed with his abetment. The case, decided by the Calcutta High Court in the 4 Revenue, Civil and Criminal Cases, p. 29, turned on Sec. 107 of the Penal Code ; and it is quite possible that, in that case, the circumstances may have been such as to make the accused person responsible for abetment by reason of his presence to assist in case of need. In this case, we have to consider whether the man, who is made a principal from his own admission of his presence, can be held, on that admission, to have continued in his abetment of the offence committed to the last. He admitted going with the rest to the scene of the crime according to a preconcerted arrangement for beating the deceased ; but, on arriving there, he, according to his own account, repudiates the statement that the deceased went with his wife, insists that the deceased is a friend of his, and strives to dissuade his associates from beating (or killing) him. It may be that the Court would attach very little weight to the exculpatory parts of this statement, as respects the accused person himself who made it. Taken with the other evidence, it might well seem to establish the case against him. But when the statement is to be used against those jointly charged and tried with him, it must be a con-

fession in the strict sense of the term. Its inherent quality must be that of a confession ; but here the inherent quality of the statement by the prisoner Krishná, was not that of a confession, and it cannot, therefore, be used against the other accused, and ought not to have been laid before the jury. We consider that, in this way, a serious error has occurred in the procedure on the trial.

It remains for us to consider how we ought to deal with the case, seeing that there have been such grave errors in the admission of improper evidence. There is no provision in the Criminal Procedure Code for enabling an Appellate Court to remand a case for a new trial. Sec. 280 of the Code provides only that an Appellate Court may reverse or alter the finding and sentence of the Lower Court; there is no express authority for remanding such a case for a new trial. On the other hand, Sec. 271 contemplates that an appeal from a conviction in a trial by jury shall be admissible on a matter of law only ; and this seems quite opposed in principle to our putting aside the inadmissible evidence and dealing with the case on the remaining evidence as we might do in a case tried without a jury. The case of *Queen v. Elahee Buksh (d)*, appears to be an authority in support of remanding the case for a new trial ; and it seems to have been held in that case that the reversal of a decision on appeal leaves it open to the Appellate Court to order a new trial. That case was decided in reference to Sec. 419 of the Code of Criminal Procedure then in existence (Act XXV., 1861) ; but there is no difference between the terms of that section and those of Sec. 280 in the present Code so far as they are material to the question now under consideration. The case of *Elahee Buksh* has been followed by this Court in two cases, one of which was the case of *Reg. v. Rámswámi Mudliár (e)*. The adjudication on questions of fact in such cases appears to have been left by the Legislature (interpreting its words by these decisions) in the hands of a

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(d) 5 Calc. W. Rep. Cr. R. 80.

(e) 6 Bom. H. C. Rep. Cr. Ca. 47.

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jury in those districts in which the local Government directs trials of offences to be held by jury ; and if we were to deal with this case as we should do in the ordinary case of a trial with assessors, we should be encroaching upon the functions assigned to a jury. If, indeed, we could say that there was no evidence to go to the jury on which a conviction could reasonably be based, we might fulfil our duty by simply reversing the convictions and sentences. If, on the other hand, we were quite satisfied that, independently of the evidence improperly admitted, there was sufficient evidence to justify the decision, or, in other words, that the prisoners had not been prejudiced by the admission of the illegal evidence, then, having regard to the provisions of Sec. 167 of the Indian Evidence Act, 1872, we should not interfere. The case we have to deal with here, however, lies between the two ; there is evidence remaining after the exclusion of the inadmissible evidence, on which a jury might not unreasonably find the accused or some of them guilty, but it does not seem to us to be conclusive as to their guilt. The interpretation put upon the old Code, admitting the course which we are about to pursue, seems to us to be equally consistent with the provisions of the present Code, and we think this is a case in which we should reverse the conviction and order a new trial.

Conviction and sentence reversed and a new trial ordered.