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the first and second clauses of Section 4 of Regulation I. of 1808 contain admissions by Government (which then was the immediate landlord of the *Shilotridárs*) tending to show that Government had not any such right. Under these circumstances, we must affirm the decree of the Assistant Judge with costs.

Decree affirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

Sept. 2.

REG. v. SAKHA'RA'M MUKUNDJI and three others.

The Indian Evidence Act. I. of 1872, *Secs.* 5, 11, 153, 155, *and* 165—*Cross-examination of a witness after his examination by the Court—Trial by Jury—Evidence properly admitted withheld from the Jury—New trial.*

The principle that parties cannot, without the leave of the Court, cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit, tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction, Section 155 of Act I. of 1872.

The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point, Sections 5, 11, and 153 (Illustration C) of Act I. of 1872.

Where such a statement, after being admitted, was withheld from the Jury, the High Court ordered a new trial.

THE four accused persons were tried and convicted of the offences of mischief by fire and being members of an unlawful assembly, by N. Daniell, Acting Session Judge of Poona, and a Jury, and sentenced, for the former offence, to five years, and for the latter to six months' rigorous imprisonment.

The material facts are as follows:—

The accused were charged with having set fire to a Máhárwádá of the village of Wáhle. After examining

several witnesses, the prosecution examined a witness named Kálu Sátu. The defendant's Vakil having declined to cross-examine him, the Session Judge asked him several questions, which elicited matter unfavourable to the accused persons. Their Vakil thereupon requested the Judge to allow him to cross-examine him, with a view to test his veracity; but the Judge refused to allow him to be questioned, except on the matter already recorded in answer to the Court. The Vakil did not avail himself of this permission.

After the close of the case for the prosecution the evidence for the defence was gone into. This included the evidence of witnesses Dhondu and Jánaku, who, among other things, stated that two of the witnesses for the prosecution, named Sávliá and Somiá, were at Dhond Village, and not at the village where the fire took place, at the time when they stated they saw the accused persons there. In the charge to the Jury, the Session Judge, with regard to the evidence of Dhondu and Jánaku, observed:—"This as evidence to impeach the credit of the witnesses Sávliá and Somiá is inadmissible; and as the alleged fact that they were in Dhond on that afternoon is not incompatible with their having visited Wáhlé, a neighbouring village, on the same afternoon, and as the witnesses Sávliá and Somiá have not been asked whether they were not at Dhond on that afternoon, this part of the evidence for the defence cannot be taken as contradictory of the alleged fact that the prisoners, or certain of the prisoners, were seen approaching, and at Sávliá's house."

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Leith (with him *Shántárám Náráyan*) for the appellants:—

The Session Judge was wrong in not allowing Kálu Sátu to be cross-examined, and in withholding from the Jury the statements of Dhondu and Jánaku.

Dhirajlál Mathurádás, Government Pleader, for the Crown.

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The judgment of the Court was delivered by

WEST, J. :—The objection on the ground of the Session Judge having declined to allow one of the witnesses to be cross-examined cannot be sustained. When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant (Section 165, Indian Evidence Act); and he is, therefore, at the same time placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right.

This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control.

The next point is that the Judge misdirected the Jury in telling them that the evidence of Dhondu and Jánaku, who were called by the defence to contradict the statements of Savliá and Somiá, that they saw the accused at Wáhlé when the Máhárwádá was burnt, is inadmissible. The Session Judge said that the evidence of Dhondu and Jánaku that Somiá and Savliá were at Dhond (the latter witnesses having said that they were at Wáhlé) was not admissible to impeach their credit, and that as Savliá and Somiá were not cross-examined by the defence, as to whether they were or were not at Dhond in the afternoon of the day the fire took place, and it was possible for them to have been during

the same afternoon at both places. The statements of Dhondu and Jánaku could not be considered to contradict the statements of these witnesses.

The rule of English law on this point is that the credit of a witness may, amongst other ways, be impeached by evidence of facts, contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways (Section 155), that is, by questions or by testimony going directly to his credit, not mediately through a contradiction of the particular matter deposed to by him in the case.

In the present instance the Session Judge seems to have been mistaken in supposing that Dhondu and Jánaku were called to impeach the credit of Savliá and Somiá in the sense of the section of the Indian Evidence Act first referred to. They were called to contradict Savliá and Somiá's statements. Their evidence, though not as to the fact in issue, was as to facts which in connection with other facts made the existence of a relevant fact, one immediately connected with a fact in issue highly improbable, and under sections 5 and 11 of this Act such testimony was relevant and admissible. If it is true, as Dhondu and Jánaku allege, that Savliá and Somiá were at Dhond till the afternoon of the day of the fire, it is highly improbable that Savliá and Somiá could have left Dhond at about 11 A.M. or noon, and therefore highly improbable that the accused should have been seen by them at Wáhlé, as they assert, at about 1 P.M. The case is like that in Illustration (*C*) to Section 153 of the Indian Evidence Act, which shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted.

The evidence having thus been properly admitted, it ought not to have been withdrawn from the consideration of the Jury, as it virtually was, by the Session Judge's charge. Its tendency was clearly to show that the alleged fact deposed

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to by Savliá and Somiá of the accused having been seen by them at a particular time and place, was not one that had really occurred, and it ought to have been allowed to have its natural weight with the Jury. We must, therefore, order a new trial.

Proceedings annulled, and a new trial ordered.

[APPELLATE CRIMINAL JURISDICTION.]

Sept. 7.

Application for exercise of Court's Extraordinary Criminal Jurisdiction.

No. 40 *of* 1874.

In re HARIRA'M BIRBHA'N.

Recognizance bond—The Code of Criminal Procedure, Sec. 502.

A Magistrate has no jurisdiction to call on a person who has entered into a recognizance bond, under Section 493 of the Code of Criminal Procedure, to pay the penalty or show cause why he should not do so, without previous *primâ facie* proof, by which is meant evidence on oath, that it has been forfeited. Section 502 of the Code of Criminal Procedure.

THE petitioner, Harirám, was directed by the Magistrate, F. P., W. W. Lock, to pay the penalty of a recognizance bond. His order was allowed to stand by A. Bosanquet, Session Judge of Ahmednagar.

The application for the exercise of the Court's extraordinary jurisdiction was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Honourable V. N. Mandlik for the applicant.

Dhirajlál Mathurádás, Government Pleader, for the Crown.

The facts, in so far as they are material, appear in the following judgment of the Court delivered by

WEST, J.:—The petitioner applies for the exercise of the Court's extraordinary jurisdiction. He was directed by Mr. Lock, Magistrate, First Class, in the Ahmednagar District, to pass a recognizance bond to keep the peace under Section