

It will be desirable that, if it be necessary, and the plaintiffs be so advised, they should be permitted to amend their plaint by stating therein the general custom of the coast, if any, as to the distance at which rows of fishing stakes are usually placed from each other. The custom, if any, may possibly vary in different places according to local circumstances.

The District Judge should permit the parties to give such evidence as to local or coast customs as they can procure or as may in other respects be necessary or may elucidate the case.

It is our strong recommendation to the parties, and we desire that the same may be conveyed to them respectively, that, if they cannot, as they ought, come to a fair settlement between themselves, they should refer the matter in dispute to the arbitration of some gentlemen of experience, who are cognizant of the mode of stake-fishing along the coast, and should not harass and exhaust each other by further litigation. If, however, they do not take this reasonable course, they should recollect that it is certain that the law is capable of compelling them to exercise their common right fairly towards each other, and not in a spirit of malice or rapacity.

Decree reversed and case remanded.

[CROWN SIDE.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, and Mr. Justice Atkinson.

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July 7.

Evidence—Confession—Indian Evidence Act (I. of 1872), Sections 25 and 167—High Court's Criminal Procedure Act (X. of 1875), Sections 23 and 101—Letters Patent, 1865, Clause 25—Power of the High Court on a point of law reserved to consider the merits of the case.

Section 25 of the Indian Evidence Act (I. of 1872) does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him.

Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.

The High Court, on a point of law, as to the admissibility of rejected evidence, reserved under Clause 25 of the Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X. of 1875), has power to review the whole case,

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and determine whether the admission of the rejected evidence would have affected the result of the trial, and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial (Indian Evidence Act, Sec. 167).

RANCHORDA'S WALJI and Pitamber Jina were tried at the third Criminal Sessions in 1877 for the murder of Pragji Dhunji.

Inverarity, who appeared for the second prisoner, Pitamber Jina, at the commencement of the trial asked that the prisoners should be tried separately.

Marriott, Advocate General (Acting), on behalf of the Crown, objected to this course, and the application was refused by the presiding Judge (Atkinson, J.), and the prisoners were tried together.

It was proved that the prisoners had gone together, on the day before the murder, to select and purchase the knife with which the murder was committed, and on the night of the murder had driven, in company with the murdered man, in a bullock cart to a spot at a short distance from the place where the murder was committed, that all three had there dismounted and walked away together, that after an interval the first prisoner returned alone, and getting into the cart desired to be driven back, that the cart-driver, noticing stains of blood on the sleeves of his passenger, suspected something was wrong, and accordingly, on reaching a police station on the road, stopped and gave information to the police which resulted in the discovery of the murder and the apprehension of the two prisoners.

Inverarity, in cross-examining the cart-driver, who was one of the witnesses for the prosecution, wished to ask whether, while the first prisoner was seated alone in the cart, the witness had not heard a policeman ask the first prisoner what he had done, and the first prisoner reply "I have killed a man, and the other has run away."

Gill, for the first prisoner, objected to the question.

Marriott, for the prosecution, also objected, and the learned Judge ruled that the question could not be put.

The jury eventually, on 5th July 1877, returned a verdict of guilty against both prisoners. Atkinson, J., however, on the motion of *Inverarity*, for the second prisoner, under Clause 25 of the

Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X. of 1875), reserved, for the decision of two or more Judges of the High Court, the question, whether the evidence of the first prisoner's confession had, under the circumstances above stated, been rightly excluded.

Inverarity, on the point reserved :—The question which I proposed to put to the cart-driver was intended, not to criminate the first prisoner, but to exculpate the second; the confession, therefore, which that question sought to establish, did not come within Section 25 of Act I. of 1872. That section would no doubt prevent the counsel for the prosecution putting the proposed question, but would not prevent the counsel for one of two co-prisoners putting it, for his object would be, not to use the confession against the person making it, but in favour of the other. Had the prisoners been tried separately, no objection could have been taken to the counsel for the second prisoner asking a question for the purpose of establishing an admission by the first prisoner that it was he who had committed the murder. A question which, if the two prisoners had been tried separately, would have been admissible, cannot be rendered inadmissible by the mere fact of their being tried jointly. If this question, admissible had the prisoners been tried separately, were inadmissible at their joint trial, then the learned Judge was wrong in refusing the application for a separate trial, and I shall move in arrest of judgment on that ground if the question be now held inadmissible.

Marriot, Advocate General (Acting), for the Crown, referred to Sections 23 and 101 of Act X. of 1875, and argued that the decision of the Judge, that the prisoners should be tried jointly, being absolutely final, and his power to reserve a question being limited to the reserving of a point of law arising in the course of the trial, the determination of which would have affected the result, the Court could not now consider whether or not the proposed question was admissible because it would have been so in a separate trial, or whether or not there should be a separate trial. The proposed question was inadmissible at the joint trial, because the object of it being, by means of the first prisoner's own admission, to throw the blame on him, and thus clear the second prisoner, it attempted to prove the first prisoner's confession as against him. Moreover, the admission of the rejected evidence would not, in fact, have affected the event of the trial.

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WESTROPP, C.J. :—We are unanimously of opinion that the question which Mr. Inverarity proposed to put to the cart-driver Bálá Rámji, in cross-examination, was, under the circumstances, admissible. On hearing the arguments, we have come to the conclusion that Section 25 of the Indian Evidence Act (I. of 1872) does not preclude the counsel for one accused person on behalf of his client, asking questions to prove a confession made by another accused person. But under such circumstances it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other. We also think that, unless the law were so, the accused person who was on his trial with the confessing party, might be considerably prejudiced by the exclusion of that evidence. The 25th section only provides that “no confession made to a police officer shall be proved as *against* a person accused of any offence.” In this case the confession was sought to be proved not as *against* either the confessing person, or his co-accused, but on behalf of the latter. There is not any thing, of which we are aware, in the Indian Evidence Act, to which Act alone (Sec. 2) we are at liberty to look for the law of evidence in this country, that would justify us in excluding such evidence when sought to be given *on behalf* of the co-accused, provided it be relevant. It may be said that it is a matter of difficulty for a jury to give to the latter accused the benefit of such evidence, and not to permit it to prejudice in their minds the confessing party. But the Court is not to presume that the jury will disobey the direction of the Judge (whose duty it is to instruct the jury as to the law), when he tells them, as he should do, that the confession made to a police officer is not to be regarded as evidence against the accused who made it. That accused would have the protection of the direction, whereas, if the confession were wholly excluded, the co-accused might suffer serious injury and would be absolutely helpless. The value of the confession, as a circumstance in his favour, may be great or small. That is a matter to be weighed by the jury. When a judge, on perusing the depositions before trial, perceives that such a confession, by one accused, is likely to be offered in evidence on behalf of another accused, it would be an important matter for his consideration whether it would not be desirable to direct that the accused persons should be separately tried.

Inverarity then submitted that the question now ruled admissible, having been rejected by the learned Judge who presided at the trial, the conviction must be quashed, as the Full Court had no power to go into the evidence for the purpose of seeing whether the event of the trial had or had not been affected by the rejection of the question. Section 167 of Act I. of 1872 refers to the Court originally trying the case, and the expression "the court" in that section, in a case tried by a jury, means the judge and the jury. In such a case it is the judge and the jury who have to decide whether the result would have been different had the rejected evidence been received; but the jury who tried this case having been discharged after returning their verdict, it is impossible now to obtain the decision of "the court who tried the case" on the question whether the result of the trial would have been different if the rejected evidence had been admitted, and it is not competent for the Full Court to go into the merits and pass a decision now. There has been a difference of opinion on this point in both the High Courts of Bombay and Calcutta: *Regina v. Navroji*,⁽¹⁾ *Regina v. Hurribole*.⁽²⁾

WESTROPP, C.J. :—We are of opinion that we now have, as was ruled by the majority of the Court in each of the two cases cited by the learned counsel for the prisoner, power to review the whole case, and determine for ourselves, whether, if the rejected question had been admitted, the result ought still to have been the same. Apart from those two cases, *i.e.*, if the question were now raised for the first time, we think that, by Clause 26 of the Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X. of 1875), the power of so reviewing the whole case, on a point of law such as the admissibility of rejected evidence when reserved, is expressly conferred on this Court. We are clearly of opinion that Section 167 of the Indian Evidence Act, 1872, is applicable to criminal as well as to civil cases, and is so to criminal cases, whether or not the trial has been had before a jury, and that the expression in that section "the Court before which such objection is raised," includes the reviewing or Appellate Court. That the 167th section applies to criminal as well as to Civil Courts is, we think, satisfactorily established by the 1st section, which renders the Act applicable "to all judicial proceed-

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(1) 9 Bom. H. C. Rep. 358.

(2) I. L. R., 1 Calc. 207.

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ings in or before any Court, including Courts Martial," with certain exceptions not material in this case; and by the 3rd section, which declares that the word "Court" includes all judges and magistrates.

Inverarity then went into the merits of the case with the view of showing that, had the first prisoner's confession been before the jury, they would not have returned a verdict of guilty against the second prisoner.

WESTROPP, C. J.:—The question which Mr. *Inverarity*, as counsel for the second prisoner, proposed to put, and which we have ruled might have been admitted, was "whether the policeman did not ask the first prisoner in the bullock cart a question, and did not the first prisoner reply 'I have killed a man on the Vellard, and the other has run away'?" The learned Judge, if he had admitted this evidence, would have been bound to tell the jury that it was not evidence against the first prisoner; but we are of opinion that he should have directed the jury to take that evidence into consideration as regarded the second prisoner. That, however, would, we think, in this instance, have left the case in precisely the same condition. Suppose the first prisoner did say "I killed the man," still he said nothing expressly exonerating the second prisoner. The jury came to the conclusion that the prisoners had acted in concert in the murder of the deceased. The rejected evidence might have proved that the blow was actually struck by the first prisoner, but it did not affect the question whether the second prisoner was acting in concert with him, and the conviction and sentence should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial. The admission of this evidence could not properly have varied the result in any respect. Under these circumstances we must allow the conviction to stand, it being in our opinion perfectly consistent with all the evidence which bears on the second prisoner.

Conviction affirmed.