APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

1881
October 5.

IMPERATRIX *v.* PANDHARINATH.*

Evidence—Confession—Admission—Self-exculpatory statement to police officer in police custody—Indian Evidence Act I of 1872, *Sections* 25 *and* 26*—Re-trial.*

A statement made to a police officer by an accused person while in the custody of the police, although intended to be made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under sections 25 and 26 of the Indian Evidence Act I of 1872, it cannot be proved against the accused.

After excluding evidence improperly admitted and put before the jury, the High Court found that the remaining evidence was not of such a character that a conviction might reasonably be based upon it. It accordingly reversed the conviction and sentence of the accused, declining to order his re-trial.

THE accused was tried by W. H. Newnham, Judge of Poona, and a jury under sections 467 and 471 of the Indian Penal Code, with having dishonestly used as genuine a forged cheque for Rs. 500, knowing or having reason to believe it to have been forged. The jury returned a verdict of guilty; and the Judge, concurring with it, convicted the accused, and sentenced him to undergo rigorous imprisonment for five years.

A theft was committed in the house of one Mr. Riddell on the 16th of August, 1878, at Lanavli. Among other things, a blank cheque-book of the National Bank of India, bearing Nos. 243701 to 243725, was stolen; and on the 16th of June, 1881, one of these cheques bearing No. 243702, with Mr. Riddell's name forged, drawn for Rs. 500 in favour of Hari Narayan, was presented for payment at the National Bank of India by Ramchandra Mulchand; but as the manager felt some doubts about its being genuine, and as he had been communicated with by Mr. Riddell at the time the theft occurred, he addressed a letter to Mr. Riddell; and ultimately the cheque, which was dated 1st of April, 1881, was made over to the police.

The evidence adduced by the prosecution tended to show that Sonya Bapa, uncle of the accused, called one Dagdu to his house where he as well as the accused resided; that Dagdu went to the house; that the accused in his uncle's presence gave Dagdu

* Criminal Appeal, No. 125 of 1881.

the forged cheque with instructions to cash it; that Dagdu wished the accused to accompany him, but that the accused excused himself on the plea that warrants of the Court of Small Causes were out against him; that Dagdu the next morning got the cheque receipted by the accused, and took it to one Govardhan, who agreed to discount it at 4 annas per cent.; that the accused wanted an immediate advance of Rs. 60, which Dagdu accordingly procured, and paid to the accused in presence of Chhotiram and Shaligram. Besides other evidence, the prosecution put in an application alleged to have been written by the accused and addressed to Mr. Wendon, an officer of the G.I.P. Railway Company, whose employé the accused himself was, with the object of proving that the writing of it and the cheque was by the same hand. The prosecution, moreover, to prove the possession of the cheque by the accused, called a policeman, who deposed that while the accused was in *faraskhana* in police custody, he put the cheque into the hands of the accused, and asked him whence he got it, and that the accused replied that he had got it from one Kisan.

The accused himself denied all knowledge of the cheque.

In delivering his charge to the jury the Judge directed their attention to three points—First, was the cheque forged? Second, did the accused endeavour to cash it? And, third, did he do so knowingly? He recapitulated the evidence, and in doing so drew attention to the statement of the policeman that the accused told him he had got the cheque from Kisan, and asked the jury to compare the handwriting of the cheque with that of the petition alleged to have been presented by the accused to Mr. Wendon.

Thereupon the jury bringing in a verdict of guilty, the judge convicted and sentenced the accused.

The accused appealed to the High Court.

Kashinath Trimbak Telang, counsel, (with him *Ganesh Ramchandra Kirloskar*, pleader,) for the appellant.—The conviction being in this case by a Judge and jury, the appeal lies on a point of law only, and the one which the appellant raises is that there is no evidence to justify the conviction. The Judge was in error in allowing the statement of the accused—that he had got the

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cheque from Kisan—to be proved by the evidence of a policeman. Such a statement amounts to a confession, and section 25 of the Indian Evidence Act I, 1872, forbids its being proved. And it was, besides, made while the accused was in police custody. It cannot, therefore, be proved: section 26. The application to Mr. Wendon was not admitted by the accused to have been in his handwriting, and no evidence had been adduced to prove it. It was, therefore, inadmissible. The accused was on a trial for uttering a forged document, and not for forgery. The comparison of handwriting was not permissible, and quite beside the right issue in the case. Eliminating these two pieces of evidence there remains the evidence of Dagdu—whose object is to shift the crime on to some one else—and Chhotiram and Shaligram, whom the Judge properly describes as " possible partisans." The conviction should be reversed, and if necessary a new trial ordered: *Reg.* v. *Amrita*[1].

Nanabhai Haridas, Government Pleader, for the Crown.—This is not a case of " no evidence." There is some evidence which the Judge and jury have believed. The statement of the accused—that he got the cheque from Kisan—was intended only to excuse himself. It was not intended as an admission or confession. If the remaining evidence be deemed insufficient, a re-trial should be ordered.

The judgment of the Court was delivered by

MELVILL, J.—The witness No. 14, a police officer, says: " The accused was sent for, and shown this cheque, and he said that one Kisan had given it to him. This was at the *faraskhana.* He was in custody. Accused said this after his arrest." This statement of the prisoner, that Kisan had given him the cheque, was used by the prosecution as an admission by the prisoner that he had had possession of the cheque, and it was put to the jury as amounting to such an admission. It is contended that sections 25 and 26 of the Indian Evidence Act (I of 1872) prohibit such a use of such a statement when made to a police officer, or by a person in custody of a police officer; and we have come to the conclusion that this contention is well founded. It is true that

(1) 10 Bom. H. C. Rep. 497.

the statement in question was probably not intended as a confession of guilt, but was rather made by the prisoner in self-exculpation; but it is nevertheless an admission of a criminating circumstance on which the prosecution mainly relies, and formed, indeed, the most important part of the evidence against the accused. We think that such an admission comes properly within the rule of exclusion which the Legislature has laid down in regard to confessions made by a person in custody of the police.

There is another piece of evidence in the case, viz., an application alleged to have been made by the prisoner to Mr. Wendon, which ought not to have been allowed to go to the jury. It was not admitted or proved that this application had been written by the accused, and it was not, therefore, admissible, under section 73 of the Evidence Act, for the purpose of comparison of handwriting. It is true that the Session Judge told the jury not to attach much importance to this piece of evidence; but it is easy to imagine that, if they looked at the application, and came to the conclusion that it was in the same handwriting as the cheque, it may have had a very considerable effect in inducing in their minds a belief of the guilt of the accused.

Being of opinion that evidence has been improperly submitted to the consideration of the jury, it is necessary for us to set aside the conviction and sentence. We have next to consider whether we ought to order a new trial. We do not think that we should do so, unless the remaining evidence (after rejecting that improperly admitted) is of such a character that a conviction might reasonably be based upon it. We have come to the conclusion that it is not of such a character. It consists of a statement of Dagdu (No. 6), who cashed the cheque, that he received it from the prisoner, and the statements of two other witnesses (Nos. 8 and 9) who are apparently friends of Dagdu, that they saw Dagdu pay Rs. 60 to the prisoner. As Dagdu was the person who cashed the cheque, he is, of course, bound to clear himself by fixing the blame on some other person; and considering this circumstance, and the generally unsatisfactory character of the evidence of the three witnesses referred to, we

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cannot say that it is such evidence as would justify us in ordering a new trial.

We accordingly reverse the conviction and sentence, and order that the prisoner be discharged.

Conviction reversed.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

August 29.

SIR MANGALDA'S NATHUBHOY, PLAINTIFF, *v.* KRISHNA'BA'I AND BHAGVA'NDA'S PRA'NJIVANDAS, DEFENDANTS.*

Hindu law—Will—Person competent to take under a will.

The doctrine laid down dy the Privy Council in the *Tagore Case* (1)—that only a person, either in fact or in contemplation of law in existence at the death of a testator, can take under his will—is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as to those governed by the Dayabhaga.

INTERPLEADER suit. In this case the plaintiff and the first defendant Krishnabai were the children of Nathubhoy Ramdas, deceased. The second defendant, Bhagvandas Pranjivandas, was the eldest son of Krishnabai, the first defendant.

Nathubhoy Ramdas died in September, 1843, and by his will, dated the 26th August, 1843, he gave a legacy of Rs. 3,000 to his daughter, Krishnabai(the first defendant) in the following terms:—"I do further write that my daughter, Krishnabai, is very young; but after she is grown up you will give her in marriage to a good husband, looking her father and mother-in-law possessing one dwelling-house. The marriage to be performed, according to our rule, with proper presents given on the marriage and after the marriage is performed. Rs. 3,000 is to be given her from my property by my son Mangaldas. She is to place it at interest in some proper place, and the interest thereof she is to enjoy. If she get any children, then that her money go to her children, and should she not give birth to any children then after her death that money may go to my son Mangaldas."

Krishnabai married in February, 1841, and there was issue of

* Suit No. 230 of 1881.

(1) 9 Beng. L. R. 377 ; L. R. Ind. Ap. Sup. Vol. 47.