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[260] FULL BENCH—REVISIONAL CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley, Mr. Justice Scott, and Mr. Justice Jardine and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* NANA.* [10th September, 1889.]

Evidence Act (I of 1872), ss. 8, 25, 26, 27—Statements made by accused while in police custody, admissibility of—Confession—Confession leading to discovery of a fact—Statements as evidence of conduct.

The accused was charged under s. 411 of the Indian Penal Code, with dishonestly receiving stolen property. In the course of the police investigation the accused was asked by the police where the property was. He replied that he had kept it, and would show. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was contended that those statements were inadmissible, having been made when the accused was in custody of the police.

Held—

(1) That the above statements were clearly in the nature of a confession, as they suggested the inference that the prisoner committed the crime, and even if not intended by the accused as a confession of guilt they were an admission of a criminating circumstance and would form a very important part of the evidence against the accused, as showing that he had not come by the property honestly, and, therefore, properly within the rule of exclusion in regard to confessions made by a person in custody of the police.

(2) That neither of the above statements was admissible in evidence under Expl. 1 of s. 8 of the Evidence Act I of 1872, as evidence of the conduct of the accused. Section 8 so far as it admits a statement as included in the word "conduct" must be read in connection with ss. 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections.

(3) That the accused's statement, that he had buried the property in the fields, was admissible in evidence under s. 27 of the Evidence Act, as it set the police in motion and led to the discovery of the property.

A statement is equally admissible under s. 27, whether the statement is made in such detail as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed.

[F., 25 C. 413 (416); 11 Cr. L.J. 153=4 Ind. Cas. 1028=5 L. B. R. 131; Rat. Unr. Cr. Cas. 833; **Appl.**, 20 B. 215 (219); **R.**, 2 Cr. L.J. 230=20 P. R. 1905, Cr=51 P.L.R. 1905; 4 Cr. L.J. 177=16 P. R. 1906 Cr=P.W.R. 1906 Cr. p. 2 (3); 5 Cr. L.J. 300=U.B.R. (1906) 3rd Qr. Evidence p. 3; 9 Cr. L. J. 267=2 S.L.R. 27 (31) (Cr); 12 Cr. L.J. 119=9 Ind. Cas. 718=4 S.L.R. 209; 14 Cr. L.J. 252=19 Ind. Cas. 508=6 S.L.R. 143; 28 P.R. 1894 (Cr); 2 L. B. R. 168; Rat. Unr. Cr. Cas. 829; 15 Cr. L.J. 593=24 Ind. Cas. 845; **D.**, 5 Bom. L. R. 312 (313).]

REFERENCE to the Full Bench.

The facts of this case were briefly as follows:—A theft having been committed, certain persons were arrested on suspicion **[261]** of being concerned in the offence. They admitted the theft before the police, and stated that they had handed over the stolen property to one Nana. Nana was thereupon sent for and questioned by the police. Nana was asked where the property was. Nana said, in reply, "Yes, I have kept it. I will point it out. I have buried it in the fields." Nana then took the police to the spot where the property was concealed, said that he had buried it there, and with his own hand disinterred an earthen pot in which

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the property was kept. The property was shown to the complainant, and he identified it.

On these facts Nana was convicted by the First Class Magistrate of Sholapur of dishonestly receiving stolen property under s. 411 of the Indian Penal Code (Act XLV of 1860), and sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 200.

This conviction and sentence were confirmed, on appeal, by the Sessions Judge.

Thereupon the accused applied to the High Court under its revisional jurisdiction

The case was heard in the first instance by a Division Court (consisting of Scott and Jardine, JJ.), who referred the following questions to a Full Bench :—

(1) Whether any, and which, of the statements of the accused to the police were admissible in evidence against him, under s. 27 of the Indian Evidence Act?

(2) Whether any, and which, of such statements were admissible under expl. 1, s. 8 of the Indian Evidence Act?

The reference was argued before Sargent, C.J., Bayley, Scott, Jardine, and Parsons, JJ.

G. R. Kirloskar, for the accused.—I contend that the statement of the prisoner—"I have kept the property, and buried it in the fields"—is not admissible under s. 27 of Evidence Act. The property was pointed out by the accused himself. It was not discovered in consequence of any information given by him.

[PARSONS, J.—Does not the statement lead distinctly to the discovery?]

[262] I submit, not. The accused did not merely make the statement, but himself went to the spot, and with his own hands disinterred the pot in which the property was kept—*Empress of India* v. *Pancham* (1); *Queen-Empress* v. *Kamalia* (2); *Empress* v. *Babu Lal* (3).

I further contend that, if the statement is not admissible under s. 27, it is equally inadmissible under s. 8 of the Evidence Act. Section 8 is a general provision, while s. 27 applies to a special case. Under expl. 1 to s. 8 the statement must be explanatory of the Act. In the present case the act consists of pointing out the property. It is an unambiguous act requiring no explanation Refers to Roscoe on Evidence, p. 52.

Shantaram Narayan (Government Pleader), for the Crown—The statements in question are not confessions. The Evidence Act makes a distinction between an admission and a confession. Suppose the accused had said that he had got the property, but had paid for it. That would not be a confession. There must be a clear admission of guilt. The statements in question are not such an admission of guilt. They are, therefore, not excluded by ss. 25, 26, or 27 of the Evidence Act. They are further admissible, under s. 8, as evidence of the conduct of the accused—*Queen* v. *MacDonald* (4); *Empress* v. *Rama Birapa* (5); *Reg.* v. *Jora Hasji* (6); *Queen* v. *Pagaree Shaha* (7); *Queen-Empress* v. *Commer Sahib* (8); Taylor on Evidence, ss. 824—825. The fact that the accused

(1) 4 A. 198. (2) 10 B., 595. (3) 6 A. 509.
(4) 10 B.L.R. App. 2. (5) 3 B. 12. (6) 11 B.H.C.R. 242.
(7) 19 W.R. Cr. R. 51. (8) 12 M. 153 (154).

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disinterred the property with his own hand, is not a ground for excluding the statements, as it led to the discovery.

JUDGMENT.

SARGENT, C. J.—The question raised by the reference is as to the admissibility of certain statements made by the prisoner when in the custody of the police. The prisoner was charged, with four others, with offences under ss. 457 and 380 of the Indian Penal Code, and found guilty of receiving stolen goods, knowing them to be stolen, under s. 411 of the Code. The [263] first statement is that deposed to by the police patel. He says: "We asked Nana where the property was. He replied that he had kept it, and would show. He said he had buried the property in the fields. We then followed Nana (we, *i.e.*, the chief constable and the *panch*). Nana went and stood at the place where the property was buried, and with his own hands disinterred the earthen pot in which the property was kept." The second statement is said to have been made when the spot was pointed out by him, on which occasion it is said he stated that he had buried the property there. The above statements are clearly, we think, in the nature of a confession. "They suggest the inference that the prisoner committed the crime," to use the language of Mr. Justice Stephen in his Digest on the Law of Evidence; and even if not intended by the accused as a confession of guilt, they would nevertheless, as Mr. Justice Melvill says in *Imperatrix* v. *Pandharinath* (1), be "an admission of a criminating circumstance on which the prosecution mainly relies, and would form a very important part of the evidence against the accused," as showing that he had not come by the property honestly; and, therefore, "properly within the rule of exclusion in regard to confessions made by a person in custody of the police."

Such being the nature of the statements, we think that neither of them was admissible under s. 8, expl. 1, as evidence of the conduct of the accused. The above section, so far as it admits a statement as included in the word "conduct," must, we think, be read in connection with ss. 25 and 26, and cannot admit a statement, as part of the evidence, which would be shut out by those sections. This agrees with the view taken by the Court in *Reg.* v. *Jora Hasji* (2) where it is said, in discussing the above section, that "the rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it."

As regards s. 27, it has been contended that it is not applicable, as the property, it is said, was not discovered in consequence of the information given by the accused to the police, [264] but by the act of the accused himself on the spot; and the case of *Queen-Empess* v. *Kamalia* (3), following the expression of opinion by Straight, J., in *Empress of India* v. *Pancham* (4), was cited as an authority for that view. It is clear, however, that it was upon the information which the statement gave the police that they accompanied the accused to the spot where the earthen pot was disinterred by the accused containing the property, and it is equally clear that, if it had not been for this information, the property would not have been discovered, and it is, therefore, in accordance with the ordinary use of such terms to say that the discovery of the property in this case was "the

(1) 6 B. 34 (37).
(2) 11 B.H.C.R. 242 (246).
(3) 10 B. 595.
(4) 4 A. 198 (206).

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consequence" of the information. It set the police in motion, the immediate consequence being that the police asked the accused to show them the spot, and accompanied him there; but such a proceeding on the part of the police was with the view to the discovery of the property, and was the natural consequence of the information they had received from him, and so connected it with the final result, *viz.*, the discovery of the property as a *causa causans*.

This agrees with the view taken by the Madras High Court in the *Queen-Empress* v. *Commer Sahib* (1) where they say: "This statement made by the prisoner, that he had deposited the clothes with the witnesses who produced them on his demand, was the proximate cause of the discovery"; or, as the Court afterwards says, "was the necessary preliminary to the fact discovered," as was the case with the information given in the present case. Whether the statement made by the accused is of such a detailed description as to enable the police themselves to discover the property, or only of such a nature as to require his assistance in discovering the exact spot where the property is, cannot, in our opinion, affect the question. In both cases there is the guarantee afforded by the discovery of the property for the correctness of the accused's statement; and which is presumably the ground of the admission of the exception to the general rule: see Taylor on Evidence, s. 824. The distinction sought to be drawn appears to us, therefore, to be without substance.

[265] But it remains to consider whether the whole statement was admissible in evidence, and as to this there would appear to be little or no difference in the views of the several High Courts. "So much of the information as distinctly led to the discovery of the property may be admitted," is the ruling of this Court in *Reg.* v. *Jora Hasji* (2) after a full consideration of the section, and which, we believe, has always been acted upon in this Court. The judgment in the Madras decision above cited is virtually to the same effect, as also the conclusion expressed by Straight, C.J., in *Queen-Empress* v. *Babu Lal* (3) that "s. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence." Lastly, this view was emphatically endorsed by Mr. Justice Norris delivering the judgment of himself and Mr. Justice Mitter in *Adu Shikdar* v. *Queen-Empress*(4). Here the statement by the accused, that he had buried the property in the fields, distinctly set the police in motion, and led to the discovery of the property. But the statement that "he had kept" the property is not necessarily connected with the fact discovered, and was, therefore, in our opinion, not admissible.

We have not referred to English authorities, as little advantage is, we think, derived from doing so. An examination of them shows doubtless that towards the close of the last century no statements were allowed to be given in evidence, but only the fact discovered—*Warwickshall's Case* (5). However, in 1839, the rule had become altered, as we find Tindall, C.J., in *Reg.* v. *Gould* (6) holding "that the words used with reference to the thing found" were admissible, and, as a consequence, allowing the statement that the accused said he had thrown the lantern into the well to be admitted; and the rule, as laid down in Taylor on Evidence, as being now in

(1) 12 M. 153 (154). (2) 11 B. H. C.R. 242 (245). (3) 6 A. 509 (546).
(4) 11 C. 641. (5) I Leach, Cr. Ca. 263. (6) 9 C. & P. 364.

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force is "that so much of the confession as relates distinctly to the fact discovered by it may be given in evidence." It was apparently the object of the Code to set the question at rest by adopting this view of the law, and [266] it has done so in language which admits no reasonable doubt of its meaning. If so, it is our duty to give effect to it. We must, therefore, hold that the first statement subject to the above remarks was admissible in evidence.

JARDINE, J.—I have never doubted the correctness of the view, in the learned judgment just delivered, of the extent of s. 8 of the Indian Evidence Act. I am of opinion that expl. 1 does not render admissible, as evidence, any statement which ss. 25 and 26 exclude, and is not to be construed as if it were a proviso to those sections. The special provision in ss. 25 and 26 being unambiguous are not cut down by s. 8. *Generalia specialibus non derogand*—Maxwell on Stat. 213, 2nd ed.; *The King* v. *The Poor Law Commissioners* (1); *Churchill* v. *Crease*(2). I also concur in holding that the statements were confessions made by the accused while in the custody of a police officer, and I concur with the rest of the Court as to how much of the statements are admissible, supposing s. 27 admits any, and in all the reasons given. It is undoubted that the statements "relate distinctly to the fact discovered;" and it is clear that they would be admissible, if the police or other person had without further aid from the accused found the property— Taylor on Evidence (4th ed.), 824; *Rex* v. *Butcher* mentioned in the note to *Rex* v. *Warwickshall* (3); *Reg* v. *Gould* (4). But the evidence shows, and the Magistrate finds, that the property was buried in a place which could not have been found out by any one but Nana himself. This fact raises the question whether the discovery was caused by the acts of Nana, or whether the words "thereby discovered," as used in s. 27, will, on reasonable construction, include the statements otherwise not admissible. About this I have had some doubts. In England they would be admissible, not as confessions so much as statements accompanying conduct (Taylor on Evidence, s. 825); and it occurred to me that if the Indian Legislature had intended to admit such statements as evidence, it would have naturally made that provision in s. 8. (See the observations on *Reg.* v. *Gould* in 1 Phillips on [267] Evidence, 416, 10th ed., and Russell on Crimes.) After further consideration I come to the opinion that, in regard to the extent of the words "thereby discovered," we may derive some assistance from the test applied by the Courts in dealing with proximate and remote cause of damage, namely, whether what followed was the natural and reasonable result of the defendant's act. I am convinced by the reasoning of the learned Chief Justice, that the taking to the field and the later unearthing of the property were natural consequences of Nana's first statements. It being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and that this Court is not divided in opinion. But, to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate causes, I would refer to Lord Blackburn's decisions, where he discusses Lord Bacon's maxim, "It were infinite for the law to Judge the causes of causes," and the difficulty of drawing the line—*Sneesby* v. *Lancashire and Railway Co.*(5); *Dungeon* v. *Pembroke* (6); *Hobbs* v. *London and South Western*

(1) 6 A. & E. 8, 48. (2) 1 Leach, 265. (3) 5 Bing. 180.
(4) 9 C. & P. 364. (5) L.R. 9 Q.B. 267. (6) L.R. 9 Q.B. 595.

Railway Co. (1). In the present case I am of opinion that the later acts of Nana are closely connected with his earlier statements as effect and cause, and naturally arose therefrom in the usual course of things, and are not remote and indirect consequences.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

SHAIK ALLI (*Plaintiff*) *v.* MAHOMED AND ANOTHER (*Defendants*).*

[30th September, 1889.]

Contract Act IX of 1872, *s.* 134—*Surety, discharge of—Refusal of creditor to serve summons on the principal debtor—Civil Procedure Code* (*Act XIV of* 1882), *s.* 99 *A—Practice.*

In a suit against the principal debtor and the surety, the omission of the creditor to effect service of summons on the principal debtor does not discharge the surety from his liability, under s. 134 of the Contract Act IX of 1872.

[F., 17 Ind. Cas. 893=8 N.L.R. 188; R., 16 Ind. Cas. 387; D., 1 L.B.R. 150.]

[268] THIS was a reference from Rav Saheb Anant Gopal Bhave, Subordinate Judge of Dapoli, under s. 617 of the Code of Civil Procedure (Act XIV of 1882).

The suit was for money due upon a bond executed by defendant No. 1 as principal debtor and defendant No. 2 as his surety.

The first defendant's residence could not be found, and the plaintiff was unable to serve the summons upon him. The plaintiff therefore prayed for a decree against the surety (defendant No. 2) alone.

The Subordinate Judge referred the following question for the High Court's decision:—

Is the surety (defendant No. 2) released from liability to pay the debt, under s. 134 of the Indian Contract Act, in consequence of the plaintiff's declining to effect service of summons upon defendant No. 1 (the principal debtor)?

The Subordinate Judge's opinion was in the affirmative.

Shantaram Narayan (Government Pleader), for the plaintiff.—The suit was brought against the principal debtor and the surety, and as the principal debtor's residence could not be found, the plaintiff could not serve the summons. The inability of the plaintiff to serve the summons does not discharge the surety from his liability—*Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (2). The suit as against the principal debtor may be dismissed by the Court under s. 99A of the Civil Procedure Code (Act XIV of 1882), but the claim as against the surety must be awarded.

Narayan Ganesh Chandavarkar, for the defendant (surety).—Where the creditor sues the principal debtor and the surety jointly, and releases the principal debtor, he cannot hold the surety liable. The refusal by the plaintiff to serve the summons on the debtor justifies the discharge of the surety under s. 134 of the Contract Act IX of 1872. In omitting to

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* Civil Reference No. 12 of 1889.

(1) L.R. 10 Q.B. 121.

(2) 12 C. 330.