1900.

SHAMRÁO PANDURANG v. SECRETARY OF STATE.

of this case. The Collector of Thána suggested as much, but he was overruled. If the indenture was necessary, it should have been in accordance with the Maráthi agreement of 1885. The District Judge's view on this point seems to be correct. I would, therefore, reverse the decree of the lower Court and award the plaintiff's claim, in regard to both the declaration and injunctions sought by him.

Decree reversed.

APPELLATE CRIMINAL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX *v.* RUDRA.*

1900.
April 10.

Evidence—Dying declaration—Indian Penal Code (Act XLV of 1860), *Sec.* 396.

Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamádár of police by one Fakiria Shimpi, who received wounds during the dacoity and who died before the trial commenced.

The Assistant Surgeon, who made the *post-mortem* examination on the deceased, was not called, being on leave, but the Civil Surgeon, on a perusal of the notes left by the Assistant Surgeon, gave evidence that the cause of death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it.

Held, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.

APPEAL from the conviction and sentence recorded by R. J. C. Lord, Sessions Judge of Dhárwár.

The accused was tried (with two others) on a charge of dacoity under section 396 of the Indian Penal Code (Act XLV of 1860) by the Sessions Judge assisted by two Assessors. The Judge

* Criminal Appeal, No. 83 of 1900.

1900.

IMPERATRIX v. RUDRA.

differing from both the Assessors found the accused guilty of the offence charged, and sentenced him to transportation for life.

The case for the prosecution was that the accused was one of the gang of dacoits who attacked and looted a wedding procession, and during the affray the accused stabbed the deceased Fakiria Shimpi. The dacoity took place on the evening of the 12th August, 1899. A statement, made by the deceased, was recorded by a police jamádár on the 13th August, because he thought that the deceased was on the point of death, and the Magistrate, who had been sent for, had not arrived. In that statement the deceased stated that the accused gave him a stab on the right side of his chest. The deceased died on the 20th August. The conviction and sentence were mainly based upon the alleged dying declaration and the deposition of one witness. The accused preferred an appeal, urging (*inter alia*) that the so-called dying declaration was not properly recorded, and should be left out of consideration, and that the evidence of the witness on whom the Judge relied was unreliable.

Mahadeo B. Chaubal, for the appellant (accused).

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader) for the Crown.

PARSONS, J.:—The dacoity is alleged to have taken place on the evening of the 12th August, and clothes and ornaments to the value of some Rs. 2,750 are said to have been stolen, of which a silver *tolbandi* and a few clothes only have been recovered. Nothing, however, was found in the possession of the appellant, who was the accused No. 1 in the Sessions Court, and he was convicted by the Sessions Judge solely because the latter saw no reason to distrust the dying declaration of Fakiria Shimpi and the deposition of witness No. 1. The Assessors were of opinion that he was not guilty. We think that the charge is not proved against him. The declaration of Fakiria Shimpi must be eliminated from the evidence. It was made on the 13th August, and Fakiria died on the 20th. The Assistant Surgeon, who made the *post-mortem* examination, has not been examined as a witness. The Sessions Judge says as to this: "The Civil Surgeon had to be asked to give his opinion upon the Assistant Surgeon's notes of

the *post-mortem*, his handwriting being proved by the compounder, because the Assistant Surgeon had gone on leave: the proceeding appeared to be somewhat objectionable, but under the circumstances was unavoidable. The opinion of the expert was, however, in favour of the defence, and the charge against the accused reduces itself naturally to one of dacoity alone." The Civil Surgeon says: "From those notes I find that the corpse had a wound in the right axilla. Also one of the ribs was fractured. From the report and the facts it contains I am certain that the cause of death was pneumonia. The pneumonia was aggravated by the injury, though not caused by it: the adhesions point to chronic lung disease, and I consider the man must have been ill before. From the notes I am of opinion that the wound was not such as would be likely, in the ordinary course of nature, to cause death." No explanation is given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there is nothing in the notes to support it. The cause of death is not mentioned in them. In the absence of evidence to prove that the death of Fakiria Shimpi was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, his declaration ought not to have been admitted in evidence.

There remains only the statement of the complainant. The delay in naming the accused as one of the dacoits is such as to render the evidence of little value. The reason given for not telling the village officers, namely, that the complainant was a stranger and the dacoits were of the same village as those officers, is not true because the accused was not an inhabitant of the same village as those officers. The further reason that he thought it better to mention all the names at one time is also untrue, because the accused No. 3 was then and there in the custody of the village officers, and was named by the complainant. Besides, if he would not tell the village officers, there was no reason why he should not have told Fakiria Pinjar, Fakiria Kurbav, Shamava and Gadigyavva, and he gives none. The accused is an inhabitant of the same village as the complainant and was known to him before, and the fact that he did not mention his name at once throws great doubt upon his after identification, particularly when

1900.

IMPERATRIX v. RUDRA.

the witnesses Nos. 2 and 3, who were spectators or victims of the dacoity and who also knew the accused No. 1 before, say that they did not see him at it. Very little weight seems to have been attached to the evidence at the time, because we find that the house of the accused was not searched till the 18th, and he was not arrested till the 19th.

We reverse the conviction and sentence passed upon the appellant, acquit him of the offence charged, and direct that he be set at liberty.

Conviction and sentence reversed.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE GOVIND HANMANT.*

1900. *April* 17.

Criminal Procedure Code (Act V of 1898*), Sec.* 250*—Application for an order that a person should give security to keep the peace—Refusal of application—Compensation under Section* 250 *of Criminal Procedure Code (V of* 1898*).*

To justify the application of section 250, a person must be accused before a Magistrate of an offence triable by a Magistrate.

A applied to a Magistrate of the First Class to order B to give security to keep the peace (section 107, Criminal Procedure Code, 1898). The Magistrate after inquiring into the matter discharged B under section 119 of the Criminal Procedure Code and directed A to pay B Rs. 50 as compensation under section 250 of the Code.

Held, that the award of compensation was illegal. The institution of proceedings under section 107 of the Criminal Procedure Code was not an accusation of an offence triable by a Magistrate within the meaning of section 250 of the Code.

Queen-Empress v. *Lakhpat*[1] followed.

REFERENCE under section 438 of the Criminal Procedure Code (Act V of 1898) by F. C. O. Beaman, Sessions Judge of Belgaum.

One Govind Hanmant Kulkarni applied under section 107 of the Criminal Procedure Code (Act V of 1898) to the First Class

* Criminal Reference, No. 5 of 1900.

(1) (1893) 15 All., 365.