1900.

GOVIND v. PARASHRAM.

alone, the bar imposed by section 43 of the Code of Civil Procedure has to be relaxed.

Then comes the question how far does this relaxation extend? Does it nullify the whole of that section, and remove the restriction both on the splitting of claims and the splitting of remedies? We think not; its only purpose is, in our opinion, to relieve a mortgagee from the restriction placed on the splitting of his remedies. The rest of the restriction is unimpaired, and inasmuch as the plaintiff in this case has omitted in his former suit to sue in respect of the Rs. 11,505, which was a portion of his claim, he cannot now sue in respect of the portion omitted.

For these reasons we think that section 43 of the Code of Civil Procedure is a bar: the decree of the lower Court must be confirmed and this appeal dismissed with costs.

Decree confirmed.

APPELLATE CRIMINAL.

Before Mr. Justice Fulton and Mr. Justice Batty.

1900.

August 20.

QUEEN-EMPRESS *v.* BASVANTA AND OTHERS.*

Evidence—Confession—Retracted confession—Evidence Act (I of 1872), *Secs.* 24, 30 *and* 33*—Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings.*

A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872).

A mere subsequent retractation of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

Imperatrix v. *Balya Dagdu*(1) dissented from.

Reg. v. *Balvant*(2) followed.

Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came

* Ciminal Appeals, Nos. 350 to 352 of 1900.

(1) Cr. Rul. No. 3 of 1898. (2) (1874) 11 Bom. H. C. R., 137.

on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial,

Held, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

APPEALS from the convictions and sentences passed by F. C. O. Beaman, Sessions Judge of Belgaum, in the case of *Queen-Empress* v. *Basvanta* and four others.

The five accused were committed to the Sessions Court of Belgaum on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

Accused Nos. 1 and 2 made confessions before the First Class Magistrate of Belgaum implicating themselves and the other accused in the crime.

These confessions were subsequently retracted by the accused during the course of the preliminary inquiry before the committing Magistrate on the ground that they had been extorted by torture.

The Sessions Judge refused to admit these confessions in evidence, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness.

On the rest of the evidence for the prosecution the Sessions Judge concurring with the jury convicted all the accused of the offence charged, and sentenced them each to death subject to the confirmation of the sentence by the High Court.

Thereupon the accused appealed to the High Court.

Rao Bahádur *V. T. J. Kirtikar*, Government Pleader, for the Crown.

Nilkhant Atmaram for accused Nos. 1, 2 and 3.

B. A. Bhagwat for accused Nos. 4 and 5.

FULTON, J.:—In this case the Sessions Judge of Belgaum has, on the unanimous verdict of a jury, convicted the five accused persons of the murder of one Satyagowda and has sentenced them to death. Against these convictions the prisoners have all appealed, and the case now comes before us, both on appeal and on the reference of the Sessions Judge, for confirmation of the sentences.

1900.

QUEEN-EMPRESS v. BASVANTA

The murder is proved to have been committed about 10 or 11 A.M. on the 14th April in the open street in the village of Nidsoshi, and there seems no reason to doubt that two persons —Ananthhat and Gopal—were actually present at the scene.

The third accused was arrested within a very short time of the murder at a well on the Akivat road, where he was washing his clothes. The fourth and fifth accused were arrested about 10 P.M. the next day in a hut about a quarter or half a mile from the village of Nidsoshi. The first and second accused were arrested at Belgaum on the 22nd April—eight days after the murder.

The evidence to support the conviction has been carefully analysed by the Judge in his charge to the jury, and his classification may conveniently be adopted. (His Lordship then discussed the evidence in detail and continued as follows:—)

It was suggested that the deposition of witness No. 25, who died before the trial, was inadmissible, as he was not cross-examined before the Magistrate. But, we think that, as the accused persons had the right and opportunity of cross-examining him, his evidence was admissible under section 33 of the Evidence Act, notwithstanding the omission of their pleader to avail himself of that right.

So far the case as presented to the jury was simple. Their verdict was amply supported by the evidence before them. But in addition to that evidence there are the confessions made by accused Nos. 1 and 2 on the 30th April, which, it is contended, introduce an element of uncertainty.

The learned Sessions Judge refused to admit these confessions, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness. The Government Pleader on the one side and Mr. Bhagwat on the other on behalf of accused No. 5 have both applied to us for their admission.

For two reasons we think that the Judge was in error in rejecting them.

In the first place, even if inadmissible against accused Nos. 1 and 2, who made them, they ought to have been admitted in favour of No. 5 on the principle explained in the case of *Pitamber*

Jina[1]. The Judge himself, when he came to pass sentence, felt the difficulty of the situation. He then very properly referred to these confessions, for it would have been wrong to pass sentence of death on No. 5 without reference to them. Similar considerations might have suggested the necessity of laying them before the jury; but we notice with some surprise that the pleader for No. 5 does not appear to have pressed for their admission. Perhaps it may have been thought that they would not influence the verdict; but they were obviously material to the case and required to be taken into account.

In the second place we think that even as against accused Nos. 1 and 2 there was no sufficient reason for their exclusion.

We are of opinion that in India a confession duly recorded and certified under section 164, Criminal Procedure Code, is admissible in evidence against the person making it, unless shut out by the provisions of section 24 of the Evidence Act, "to which alone", as pointed out in *Pitamber's* case[1] by Chief Justice Westropp, "we are at liberty to look for the law of evidence in this country."

We have read with sympathetic interest the discussion on this subject which has lately appeared in the July Number of the *Bombay Law Reporter* and appreciate the manifest earnestness of the writer in his desire to prevent the extortion of confessions by unfair means. But, in deciding whether or not any particular confession is admissible in evidence, we have to be guided by the provisions of the law enacted by the Legislature. It is true that in England when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This is the law laid down in the *Queen* v. *Thompson*[2] by Mr. Justice Cave with the concurrence of Lord Coleridge, C. J., and Hawkins, Day, and Wills JJ.

In India the law on the subject is contained in section 24 of the Evidence Act, as follows:—

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused

(1) (1877) 2 Bom., 61. (2) (1893) 2 Q. B., 12.

1900.

QUEEN-EMPRESS v. BASVANTA.

by any inducement, threat, or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The section must be fairly construed according to its language, and if this is done it seems to us impossible to contend that the law in India is identical with the law in England as explained in *The Queen* v. *Thompson* and the cases therein referred to. The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in that section. It may be that this section does not require positive proof, within the meaning of section 3, of improper inducement to justify the rejection of the confession. The use of the word "appears" indicates, it may be argued, a lesser degree of probability than would be necessary if "proof" had been required. A Court might perhaps in a particular case fairly hesitate to say that it was *proved* that the confession had been unlawfully obtained, and yet might be in a position to say that such *appeared* to it to have been the case. Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest. It does not seem possible to say that the mere subsequent retractation of a confession which has been duly recorded and certified by a Magistrate, is enough in all cases to make it appear to have been unlawfully induced. Without assuming the functions of the Legislature we cannot lay down any general rule to meet the varying circumstances of different cases. To require, as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not, in our opinion, be consistent with the terms of sections 21 and 24 of the Evidence Act, or with the interpretation given to those sections by Mr. Justice Nanabhai in *Reg.* v. *Balvant*[1] which appears to us to have been correctly decided and to be in harmony with the practice of the Courts.

(1) (1874) 11 Bom. H. C. R., 137.

The remarks made in *Imperatrix* v. *Balya Dagdu*[1], in so far as they may have been intended to prescribe a different practice, cannot, we think, be accepted as consistent with section 24, nor do they appear to have been necessary for the decision of the case in which the disputed confession was accepted and acted on.

It may be thought that the law as it stands does not afford adequate protection to prisoners against illegal practices whereby confessions are extorted, but it is not permissible to us to amend it. What the Legislature doubtless hoped and intended was that Magistrates would not record confessions unless they really believed that they were made voluntarily (Cf. *Queen* v. *Thompson* [2]). In the case of Magistrates acting under section 164 of the Criminal Procedure Code, there can be no question that they must be affirmatively satisfied of the voluntariness of the confession, and that when in doubt on this point they ought not to record or give the certificate. The consideration which this question is at present receiving will, we hope, lead to the issue of such instructions as may help Magistrates in the difficult task of deciding what confessions are "voluntary," but the matter is not one that can be further discussed in this judgment, in which we are confined to the points immediately at issue.

In the present case we can see no reason for supposing that the confessions were not voluntarily made. The accused were arrested on the 22nd and were sent to the Magistrate on the 29th April. Their statements were recorded on the 30th, at which time their bodies were examined, and no marks of ill-treatment were discovered. Subsequently in the committal proceedings they retracted their confessions and said according to the English translation that they had been tortured. According to the vernacular, which doubtless contains the words actually used, No. 1 said he had suffered *tras* (trouble—annoyance), and No. 2 said he had been beaten (*badadu-hodadu*). The Magistrate, when these statements were made to him on the 30th May, ought, we think, to have questioned the accused further on the subject so as to ascertain exactly what they had to allege. The remarks of Chief Justice Westropp in *Reg.* v. *Kashinath Dinkar*[3] show

(1) Cr. Rul. 3 of 1898. (2) (1893) 2 Q. B., 12.

(3) (1871) 8 Bom. H. C., 126, at pp. 137, 138.

1900.

QUEEN-EMPRESS v. BASVANTA.

that allegations of ill-treatment made by prisoners are not to be overlooked. These remarks, we fear, are as appropriate at the present day as they were when they were written in 1871. But it may be that, as the Magistrate who committed the case was the same as the Magistrate who a month before had recorded the confessions and had examined the bodies of the accused, he was satisfied that the allegations of physical ill-treatment were untrue, and, therefore, refrained from further enquiry on the subject. There is nothing, then, to show that as a matter of fact these two accused had been ill-treated, for we do not think that their general statement on the subject on the 30th May outweighed the fact that no marks appeared on their bodies on the 30th April. The beating alleged by No. 2 could hardly have escaped detection, and no other form of torture was suggested. The fact that the accused were eight days in the custody of the police, might suggest unwillingness to confess at an earlier period, but in the Sessions Court the policeman (witness No. 27) who sent them to the Magistrate, was not questioned as to his reasons for the delay. Looking to the terms of the confessions themselves, there is nothing special to indicate coercion. Those terms can hardly have been dictated by the police, omitting, as they do, the name of No. 5. They contain full admissions of guilt, but they are slightly favourable to the men who made them, inasmuch as they are represented as instruments of others, rather than the originators of the plot. It may be matter for wonder why they should have confessed at all, but it is possible that they realized the hopelessness of their position, having committed the murder in the presence of witnesses and then fled from the village. In these circumstances they may have thought it useless to deny their guilt and may have supposed that confession was their best course. In many cases circumstances may suggest grounds for believing that confessions have been made under pressure, but such circumstances seem to us wanting in the present case. The Magistrate who recorded the confessions has certified that he believes them to have been voluntarily made, and there is nothing to make it appear to us that they were obtained by means which would render them inadmissible under section 24.

We, therefore, decide to admit them under the provisions of section 375 of the Criminal Procedure Code. Without them

1900.

QUEEN-EMPRESS v. BASVANTA.

the evidence is amply sufficient for the conviction of accused Nos. 1, 2, 3 and 4; and the fact of these confessions having been made only serves to assure us of the correctness of the conclusion at which the jury have arrived, and to which we should ourselves have come on the evidence recorded by the Judge.

As regards No. 5, the confessions present difficulties which would otherwise have been wanting, but in spite of them we are of opinion that the conviction is right. It is difficult to disbelieve the evidence of the two eye-witnesses who are as positive about No. 5 as about the other prisoners.

(His Lordship, after dwelling upon the evidence presented against accused No. 5, proceeded as follows:—)

It seems impossible to suppose that all this evidence could thus hastily have been concocted against No. 5, merely on suspicion based on the old feud, or to doubt the truth of what the witnesses depose to. How, then, can the omission of the name of No. 5 in the confessions be accounted for? We think that it can only be explained on the hypothesis that for some reason or other Nos. 1 and 2, who probably knew nothing of his report, wished to screen him. They knew the facts, and possibly believed that he was not such an active instigator as Nos. 3 and 4. He seems to have taken a less prominent part in the murder itself and may have been half-hearted, but that he was concerned both in the plot and in the crime itself we think there can be no doubt.

The murder was cruel and deliberate. All who took part in it might justly be condemned to die. But as usual in cases where many prisoners are involved, we hesitate to confirm so many sentences and try to discriminate. For Nos. 3 and 4 there seems nothing to be said. Their sentences must be confirmed. Nos. 1 and 2 are younger men who seem to have been acting under the direction of others: No. 5, though meanspirited in his conduct, seems to have been less resolute about the murder than the rest. We shall commute the sentences in the case of these three prisoners. We dismiss the appeals of Nos. 3 and 4 and confirm the sentences of death. In the case of the other three prisoners we commute the sentences to transportation for life.