APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903. July 20.

EMPEROR *v.* WAMAN SHIVRAM DAMLE.*

Charge to jury—Sessions Judge—Misdirection—Inadmissible evidence—Criminal Procedure Code (Act V of 1898), sections 418, 423 (2).

Where a charge to the jury by the Sessions Judge is, upon the whole, favourable to the accused, and most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, *firstly*, that the verdict is erroneous; *secondly*, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge.

Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 of the Criminal Procedure Code (Act V of 1898), and there is a misdirectoin of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection.

Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.

APPEAL from convictions and sentences passed by L. C. Crump, Sessions Judge of Belgaum.

The accused, twelve in number, were convicted of the offence of forgery of the will of one Lakshman Keshav Damle under section 467 of the Indian Penal Code (Act XLV of 1860), and sentenced each to undergo rigorous imprisonment for five years, and accused No. 1 was sentenced to an additional term of two years' rigorous imprisonment on the charge of using the forged will as genuine under section 471 of the Code.

* Criminal Appeal No. 169 of 1903.

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Lakshman Keshav Damle was a wealthy money-lender of Khánápur. He had one son Ganpatrao who died in 1900, leaving behind him a widow named Jankibai and a minor son Bandhu. Besides these persons, Lakshman's wife Chimabai was alive and living with him and also his natural brother Waman Shivram (accused 1).

Waman Shivram was by birth Lakshman's brother, but had been some years before adopted by Lakshmibai, the widow of one Shivram Damle, a near relative of Lakshman's father. At the date of Lakshman's death, Jankibai was living at Miraj with her parents and her son Bandhu was with her.

In 1901 there was an epidemic of plague in Khánápur. On the 10th January, 1901, Lakshman fell ill. The following day unmistakeable symptoms of plague appeared and on the night of the 13th January, 1901, he died. Shortly after Lakshman's death, Jankibai and her relatives from Miraj appeared on the scene. Chimabai at that time was seriously ill with plague. Some disputes seemed to have arisen, and on the 15th January, 1901, a number of persons, including the majority of the accused, collected at Lakshman's house, and there was a panch held with the object of arriving at some settlement. After this incident of the panch, Chimabai, Jankibai, Datto Gopal (Jankibai's uncle), and Waman (accused 1) continued to live in Lakshman's house until Chimabai's death on the 19th January, 1901.

On the 28th January, 1901, Datto Gopal applied to the Mámlatdár who appeared on the scene. It was asserted before the Mámlatdár that the will was a forgery. The Mámlatdár made a kind of summary enquiry, recorded certain statements, and made a report in favour of the genuineness of the will put forward by Waman, as Lakshman's last will. This will, it was contended by the defence, was written on the day it bore date (10th January, 1901). It was contended by the prosecution that the will was a forgery, having been prepared on the 26th January, 1901, several days after Lakshman's death.

Datto Gopal next applied to the District Court of Belgaum, on behalf of Jankibai, for a temporary appointment of guardian to the estate of the minor; and pending a regular decision, the District Judge, on the 31st January, 1901, passed a temporary

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order appointing Mr. Varadaraj, the then Názir of the Court, temporary guardian. A notice was issued to accused 1 who, on the 5th February, 1901, put in an application asking that the temporary order of attachment should be set aside. This application was rejected. The date fixed for hearing the regular application was 15th March, 1901. Accused 1 obtained a postponement to the 14th June, 1901. Before this date there had been negotiations between the parties, and the hearing was postponed with a view to an amicable settlement.

On the 19th June, 1901, the parties appointed four arbitrators. The award was made but was not signed; and the matter came again before the District Court.

On the 19th July, 1901, the District Judge proceeded to hear Jankibai's application. Waman opposed it on the ground that there was a will made by Lakshman which appointed him guardian. The result of the enquiry was that on the 20th July, 1901, the District Judge appointed the Názir guardian of the property and Jankibai guardian of the person.

On the 8th November, 1901, the Názir, Mr. Varadaraj, moved the District Court to sanction the prosecution of the persons making or attesting the will. Mr. Varadaraj died on the 18th December, 1901. The application for sanction was renewed on the 24th June, 1902, and the District Judge granted the sanction on the 26th July, 1902.

In August, 1902, the present proceedings commenced.

The following are the extracts from the heads of charge by the Sessions Judge to the jury :—

"Statement said to have been made by accused 1 to the Názir inadmissible against the other accused as being a confession of an offence for which they are not being tried. At most a confession *not of forgery* but of *using as genuine a forged document*. The other accused are not being tried for the latter offence. Also self-exculpatory and therefore inadmissible against them. Does not implicate himself to the same degree as them. Do you believe that as a matter of fact that statement was made? Persons do not confess without some reason. What reason was there? The case was fixed for hearing on the 19th July, 1901. And to all appearances Waman was prepared to go on with it. If, as he suggested, he wished to compromise the matter, it was wholly unnecessary for him to implicate himself in this way. He could merely have agreed not to press his claim under the will. Mr. Manerikar's evidence important in this connection. Does not this suggest that the Názir suggested that Waman should confess

and compromise the matter, and that the Názir then assumed that his own suggestion represented Waman's statement? If this confession was made, why did Mr. Varadaraj wait for four months before taking any steps to obtain sanction to prosecute? It is true that Waman denied ever having been to the Názir at all, but is it not reasonably possible that he was taken by surprise at this unexpected statement, and foolishly denied that any interview took place? The whole matter rests on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement.

* * * * *

(5) The conduct of accused No. 1 with reference to certain property.

Prosecution perfectly entitled to prove conduct of accused No. 1 if such conduct is inconsistent with the existence of a will."

The accused appealed to the High Court.

Branson and *Robertson*, with *Nilkantha Atmaram*, for the accused.

The *Advocate-General*, with the *Government Pleader*, for the Crown.

CHANDAVARKAR, J.:—The unanimous verdict of the jury, finding the accused guilty in this case, has been accepted by the Judge, and, in accordance with it, he has sentenced accused Nos. 1 to 12 to five years' rigorous imprisonment on the charge of forgery of a will under section 467, Indian Penal Code, and accused No. 1 to an additional term of two years' rigorous imprisonment on the charge of using as genuine a forged document under section 471, Indian Penal Code. In this appeal against the convictions and sentences, the learned counsel for the appellants, relying on *Emperor* v. *Malgowda Basgowda*,[1] has contended that there was misdirection in the learned Judge's charge to the jury, because, it is urged, he omitted to call the attention of the jury to several matters of prime importance which favoured the accused. It is conceded that the Judge's charge was, upon the whole, favourable to the accused, and we think that he summed up the case most carefully and fairly. Most of the arguments urged in support of the appeal before us amount practically to this, that the learned Sessions Judge did not put the points referred to in the heads of charge in greater detail. Most of the points of importance urged by the learned counsel for the appellants have been more

(1) (1902) 4 Bom. L. R. 633; post p. 644.

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or less dealt with in the charge, and the mere fact that some of the points were not amplified as they might have been does not, in our opinion, amount to a misdirection.

There are three objections, however, urged in support of this appeal, which stand upon a different footing. They may be formulated as follows:—

(1) Exhibit 58, the deposition of the deceased Názir recorded in a civil proceeding, was wrongly admitted in evidence under section 33 of the Evidence Act as containing accused No. 1's confession.

(2) The Judge put before the jury the evidence of accused No. 1's conduct as if the jury could, if they chose, draw an inference from it against all the accused.

(3) The Judge omitted to place before the jury the evidence as to the alleged signature of Lakshman on the will, Exhibit 8, which told in favour of its genuineness and which stood uncontradicted.

As to the first of these objections, the learned Advocate-General, who has appeared for the Crown to support the convictions, has not contended that Exhibit 58 was admissible in evidence either under section 33 or any other provision of the Evidence Act. Exhibit 58 is a statement made by the deceased Názir of the District Court of Belgaum in Miscellaneous Application No. 8 of 1901 and was tendered by the prosecution for the purpose of proving an admission or confession alleged to have been made by accused No. 1 to the Názir. Its admissibility was objected to by the defence in the Sessions Court, but the Judge overruled the objection, holding that "the statement may be proved under section 33 of the Evidence Act, and is admissible as an extra-judicial confession against accused No. 1." But the Sessions Judge omitted to notice the important proviso to section 33, according to which evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding only if the parties to both the proceedings are the same. Neither the Crown nor the Názir now prosecuting the accused were parties to the Miscellaneous Application in which the deceased Názir made the statement. The argument of the learned Advocate-General is that, though the statement was wrongly admitted, that is not a valid ground for setting aside the verdict of the jury, if as a matter of fact it could not have influenced the jury, and that it

did not influence the jury is apparent from the fact that the Judge in his charge was emphatic in telling them that they ought not to believe the statement of the deceased Názir. It is indeed the case that the Judge in his summing up told the jury *firstly*, that the alleged confession said to have been made by accused No. 1 to the Názir was not admissible as against the other accused, because it was "at most a confession *not of forgery* but *of using as genuine a forged document*," for which latter offence those other accused were not being tried, and also because it was "*self-exculpatory*," inasmuch as it did not implicate himself to the same extent as it did the other accused; and *secondly*, that it was highly improbable that accused No. 1 made the alleged admission or confession to the Názir and the whole matter rested "on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement." So far the summing up was favourable to the accused; but the fact stands that the statement was allowed to go in as part of the evidence which the jury could consider, and it is contended by the appellants' counsel that when evidence which ought not to be placed before the jury is placed before them, and they are left to believe it or not, and the evidence so let in is material in the sense that, if believed, it must tell against the accused, it is difficult to say that they have not been influenced by it when, in spite of the Judge's charge that the evidence in question was not entitled to belief, they have brought in a verdict of guilty against the accused. The law on this point was carefully considered by Melvill, J., in *Reg.* v. *Ramswámi Mudliar*.[1] After observing that it is not the admission of every inadmissible evidence which vitiates a trial by jury, that learned Judge went on to say. . . . "The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the

(1) (1869) 6 Bom. H. C. Cr. 47.

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facts. . . . If the Appellate Court think that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by the Judge with the aid of assessors." This was under the Code of Criminal Procedure in force in 1869. The question is whether it is the law also under the Code of Criminal Procedure now in force. According to section 418 of the present Criminal Procedure Code, where the trial was by jury, an appeal shall lie on a matter of law only; and according to clause (2) of section 423, the Appellate Court cannot alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. Reading these two sections together, it is clear that before we can interfere with the verdict in this case on the ground that the evidence of accused P's confession was wrongly admitted, we must be satisfied, firstly, that the verdict is *erroneous*; secondly, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge. Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection, since the presumption is that the jury are well aware that it is for them to appreciate the evidence and that they are at liberty to take or not the Judge's view of it. And in this case that presumption is supported by the view the jury have taken of the case notwithstanding the tenor of the Judge's charge. It is no answer to that to say that this particular evidence which was wrongly

admitted could not have influenced the jury. Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former: see on this point *Queen* v. *Chunder Koomar Mozoomdar*.[1] In the present case almost every item of evidence relied upon by the prosecution was dealt with by the learned Judge in his charge in favour of the accused. Under these circumstances, we cannot say that the evidence of accused 1's confession which ought not to have been placed before the jury could not have influenced them in returning a verdict of guilty. We must take it, then, that there was a misdirection on a material point of law; but since the Judge directed the jury that the evidence of accused 1's confession was admissible as against him only and not against the other accused, the misdirection does not apply to their case. It is true that in directing the jury not to consider the evidence in question against accused Nos. 2 to 8, the learned Judge assigned three reasons for his view, and that one of those reasons was that the confession of accused No. 1 was self-exculpatory, inasmuch as it did not implicate himself to the same extent as them. As a matter of fact, the confession said to have been made to the Názir does not implicate any one but accused No. 8. The words of the confession as given by the Názir in his deposition, Exhibit 58, are:—"Hosmane Balappa," (that is accused No. 8), "has made this will. I tell the truth before you. Hosmane Balappa has done all this." It is possible that the Judge's statement to the jury may have conveyed to them the impression that all the accused were in fact implicated by the confession; but, having regard to the emphatic manner in which the Judge told the jury that the confession was inadmissible as against accused Nos. 2 to 8, we must hold that so far as those accused persons are concerned there was no misdirection. But as to them, the question is whether there has been misdirection in that the Judge put before the jury the evidence of accused 1's

(1) (1875) 24 W. R. 77.

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conduct relied upon by the prosecution as if it was evidence also against the other accused.

That brings us to the second objection urged in support of this appeal. In his charge the Judge divided the evidence for the prosecution into six different heads, and one of them was, as he put it, the evidence of accused 1's conduct in removing certain property. In dealing with this latter evidence, he pointed out that the prosecution was "perfectly entitled to prove the conduct of accused 1 if such conduct is inconsistent with the existence of a will," and then he went on to comment upon the circumstances relied upon by the prosecution and elicited in the evidence of the witnesses for the Crown. The summing up was, on the whole, in favour of accused No. 1 on this head also, and the learned Judge concluded this part of the charge by warning the jury against the danger of reasoning from conduct, as men often acted unreasonably. So far the charge was unexceptionable from the point of view of the accused; but, seeing that it was open to the jury to give effect or not to the warning and that after all it was they who had to consider the evidence in question and their decision on facts was final, it was, we think, a serious omission on the part of the Judge not to have expressly warned the jury that the evidence of accused No. 1's conduct was inadmissible as against the other accused. It is true that almost at the conclusion of his charge he dealt with the question of the conduct of accused Nos. 2 to 8 and that there, too, he summed up the case in their favour by pointing out "the extreme improbability of conduct imputed to the accused persons." But that part of the summing up stands apart from the portion where the evidence of accused 1's conduct was dealt with and treated as if it was evidence which could be considered as against all the accused persons and not merely accused No. 1; and nothing was said in that part by way of warning to the jury that, in considering the evidence of the accused's conduct, they should not consider it as against the rest.

We now come to the third and last objection. The accused were charged with the offence of forging a will of Lakshmaṅ Keshav Damle, and in all cases of forgery the question whether the signature said to be forged is genuine or not is more or less material. In the present case the theory of the prosecution as

to the signature on the will, Exhibit 8, purporting to be that of Lakshman Keshav Damle does not appear very clearly upon the evidence recorded, and Mr. Branson who, we are informed, appeared in the Sessions Court to defend accused Nos. 4 and 8, and who has also appeared before us in support of this appeal on behalf of those accused, has urged that in his address the Public Prosecutor in the Sessions Court was not able to advance any particular theory with reference to the question of the genuineness or otherwise of the signature. The only oral evidence on the point adduced for the prosecution is that of the pardoned approver Mangesh. His evidence is to the effect that accused No. 8 produced before him a draft and gave him "a paper signed by Lakshman Keshav Damle. It appeared to be his signature." Then he goes on to state:—"I told Mr. Gloster that the signature was genuine and I recognized it as such. Even now I say that to me it appears a genuine signature." The prosecution have put in a number of documents (Exhibits 20 to 23 and Exhibits 26 to 29) containing what are admitted for the Crown and the defence to be the genuine signatures of Lakshman Keshav Damle. It must no doubt be taken as a matter of course that the jury looked at the signature on Exhibit 8 and compared it with the signatures on the other documents; but that does not cure the defect in the summing up. It was a matter of prime importance that the prosecution was not able to adduce any evidence beyond that of the approver and he could not deny nay, he admitted that it was a genuine signature of Lakshman. The learned Judge ought to have specifically dealt with this question and drawn the attention of the jury to the approver's evidence on the point and the absence of any evidence to the contrary. The omission, we think, falls within the principle of the ruling of the learned Chief Justice in *Emperor* v. *Malgowda* [1] that a non-direction amounts to a misdirection if the point is one of prime importance, especially telling in favour of the accused.

We, therefore, hold that there have been misdirections in the case and the question is, whether the verdict can be pronounced to be erroneous owing to those misdirections? Counsel for the

(1) (1902) 4 Bom. L. R. 683.

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appellants pointed out circumstances in the case and called our attention to certain portions of the evidence to show that the verdict of the jury was, as he put it, "astounding" and "manifestly erroneous." The learned Advocate-General, on the other hand, did not argue the case before us on the merits so as to show that the verdict was in accordance with the weight of the evidence and probabilities and such as reasonable minds could arrive at. He confined himself to the question whether there were misdirections, and if there were, whether the verdict was erroneous owing to them. For the reasons to be presently given, we have come to the conclusion that the verdict is erroneous; and we think that we must also hold that the verdict is vitiated by the misdirections with which we have dealt. We think that the reception of accused 1's confession and the treatment of the evidence of accused 1's conduct as if it was evidence against all the accused, and the omission to deal with the question of the genuineness of the signature, must have seriously affected the merits of the case and influenced materially the verdict of the jury. In the language of Melvill, J., in the case above cited, "as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question," so far as that evidence was wrongly admitted and treated in the Judge's charge, the verdict of the jury "is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts." It is competent to us, under these circumstances, to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict and to determine the appeal: see *Queen-Empress* v. *Ramchandra*, Criminal Ruling No. 11 of 1895.

We are spared the necessity of dealing with the evidence in detail, as it has been clearly set forth in the Judge's charge and its infirmities have been lucidly pointed out there. The case, moreover, for the prosecution is simple, though the evidence adduced is voluminous. The question is, whether the will, Exhibit 8, is a forgery? We have at the outset the unchallenged fact, sworn to by the approver, Mangesh, that the signature on Exhibit 8 is genuine and "appears to be a genuine signature." A comparison of that signature with the signatures on Exhibits

20 to 23 and 20 to 29, which are admittedly genuine, has satisfied us that it resembles the latter and that there is no marked difference between them to excite suspicion. The Názir, who is administrator of the property of the minor grandson of Lakshman, states in his deposition, Exhibit 4, that when he was first instructed that the will was not genuine, he was told that it was not genuine because Lakshman had not been in a position to make a will and that the ink of the signature was different from the body of the writing. But, so far as we can see, no difference of ink is perceptible.

We start, then, with this circumstance in favour of the will that the signature is genuine. The case for the prosecution, however, is that a week after Lakshman's death, the pardoned approver, Mangesh, was called to the house of accused No. 8, who there produced to him a draft and asked him to copy it on some pieces of blank paper, one of which contained Lakshman's signature. This story stands on the evidence of the approver alone; and it is so full of improbabilities that it is difficult to believe it. Here is a man who, when examined by the Mámlatdár and the Sub-Registrar, swore to the genuineness of the will, but who afterwards stated before Mr. Gloster, the District Judge of Belgaum, that it was a forgery, under the impression, as he stated then, that a pardon had been given to him. His story is that when accused No. 8 asked him to copy the will he refused, but that accused No. 8 having threatened him, he wrote it in the presence of several persons. The suggestion of the defence is that the statement made by the approver before Mr. Gloster was made because he had been won over by Jankibai's side; that just then he was hard up for money which he had to pay for *tagai* and that just about that period he was able to pay the amount. This suggestion finds some support from the approver's answers in cross-examination. There is, moreover, evidence to contradict this witness so far as it could be contradicted. Mangesh says that when he copied the will at accused No. 8's instance in the house of the latter, his (Mangesh's) brother Datto was present. Datto has been called for the defence and denies that he was present at any such meeting. Five witnesses examined for the defence swear that the will was written in Lakshman's house and

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presence by Mangesh, that it was signed by Lakshman in their presence, and attested by accused Nos. 2 to 8. Their evidence shows nothing which would justify us in disbelieving them and believing the approver. In his charge to the jury the Judge rightly brushed aside the evidence of the approver as unreliable. We have, in addition, the fact that accused Nos. 2 to 8 swore before the Sub-Registrar that Lakshman had signed the will in their presence and that they had attested it at his instance. The evidence for the prosecution shows that these eight persons were Lakshman's friends and that they are persons who are invited along with others on important occasions such as adoptions or executing deeds (*vide* Exhibits 9 and 11). This is the positive evidence to prove the genuineness of the will and the probabilities so far support it. When we are dealing with the question of probabilities and testing the oral evidence by means of them, the theory of improbability must be such, as observed by the Privy Council in *Chotey Narain Singh* v. *Ralan Koer*,[1] that "in order to prevail against such evidence as has been adduced" in support of the will, it must be "clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility." On what does the theory of improbability advanced in this case by the prosecution rest? First, it is said Lakshman "was not in a position to make a will" on the day and at the time the will is said to have been made, and when we come to examine what that means it comes to this, not that Lakshman was unconscious or so enfeebled by his disease (plague) that he was physically incapable of making the will, but rather that to almost every one who saw him he spoke as if he did not think he was going to die. The inference suggested is that as he did not take a serious view of his illness he did not feel the necessity of making a will and therefore could not have made one. A man may not think he is going to die and yet there is nothing improbable in his making a will. Here it is common ground that on Friday (the date of the alleged will) he had a bubo and that his case was discovered to be one of plague. It may be that to those who came to inquire after his health he spoke as if he did not take a serious view of his illness; but that does not militate against the theory that

(1) (1894) 22 Cal. 519 at p. 531.

seeing he had plague he thought it proper that he should make a will and not let his affairs lie uncertain in the event of his death. Some witnesses for the prosecution state that when they called on him on Friday he did not say anything about a will to them. That part of the evidence is purely negative and it is best answered in the language of the Privy Council in the case already cited that we cannot assume that a person who has made a will must necessarily have introduced the subject of it into his conversation with every friend or acquaintance whom he happened to meet. Three of Tatya's servants have been examined and they say there was no will; but, as the Judge put it in his summing up, this is not a reliable class of witnesses. Parshya (Exhibit 32) says that he was in Lakshman's house on Friday, that Lakshman was in the *Majghar* and that he saw no paper written. But he admits that on Friday he looked after the bullocks and that at intervals sat at the house; that he saw many persons come to see Lakshman and that one of the accused, accused No. 2 and some others may have come. He does not know what they did with Tatya. Gangappa (Exhibit 33), who says he attended on Lakshman on Friday, can tell that Rambhat, Krishnabhat and Vishnu, two of whom are witnesses for the prosecution, came to see Lakshman on Friday, but he cannot remember who else came. The third servant Abdul's story is discrepant and the Sessions Judge has commented on his demeanour as suspicious. There can be no doubt on the evidence for the prosecution that Lakshman was physically capable of making a will on Friday. The learned Sessions Judge charged the jury to that effect. The evidence is that he was conscious, though he had high fever and a bubo, and that he *was* able to converse with all who came to see him. The bubo was under his right arm, but that could not have prevented him from putting his signature because witness No. 3, Krishnaji (Exhibit 9), who saw him at 9 P.M. on Friday, states that Lakshman told him that the bubo did not give him much pain.

We come next to the nature of the provisions of the will, which, according to the *dictum* of their Lordships of the Privy Council in *Bamasundari Debi* v. *Tara Sundari Debi* (1) "is always

(1) (1891) 19 Cal. 65 at p. 74.

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a material element in such questions, from its bearing on the probabilities of the case." The will, Exhibit 8, gives half the property to accused No. 1 and the other half to Lakshman's grandson, Keshav *alias* Bindoo; it provides for the maintenance of Lakshman's wife and daughter-in-law; it directs that accused 1 should manage the minor's share during the latter's minority. These are the main provisions of the will and the case for the prosecution is that as accused No. 1 had been given away in adoption and had become separate it is highly improbable that Lakshman would have given half of his property to him to the detriment of his own grandson. Here it becomes necessary to consider the state of Lakshman's family for some time before and at the date of his death. The undisputed facts of the case are that accused No. 1 was Lakshman's brother, given in adoption to their uncle. Accused No. 1 lived separate from Lakshman with his adoptive mother and managed the estate he had inherited from his adoptive father. This went on for some years, when accused No. 1's wife having died, he came and lived with Lakshman. All the witnesses for the prosecution examined on the point state that accused No. 1 lived and messed with Lakshman and managed Lakshman's shop and trade. Lakshman had a son called Ganpati who led a loose life and died. At the date of the alleged will, then, Lakshman's family consisted of himself, his wife, his daughter-in-law Jankibai, and a minor grandson, and accused No. 1 had been living with him and managing his shop for five or six years. When Lakshman fell ill Jankibai and the minor were not in Khánápur where Lakshman lived, but were living in her parent's house at Miraj. So far the facts are undisputed, but the case for the prosecution is that, though accused No. 1 lived with Lakshman and managed his shop and had done so for some years, his dealings and estate were kept and treated as separate and that his estate was considerably less than Lakshman's. Some witnesses have given evidence in support of this case, but it is evidence of the vaguest description and their denial of the defence that when accused No. 1 came and lived with Lakshman his estate was mixed up with the latter's is refuted by the statement which Lakshman's daughter-in-law, the mother of the minor, made before the arbitrators to whom

the dispute which has led to this prosecution was referred after Lakshman's death. In that statement, which is recorded as Exhibit 54 in the case, Jankibai said:—"From that time the plaintiff," that is accused No. 1, "began staying with my father-in-law and began staying with us, having brought with him his whole property and business. It is therefore a very large portion of his property must have got mixed up with our property." Having regard to the fact, apparent from the evidence of witnesses for the Crown, that Lakshman not only allowed accused 1 to come and live with him but left the management of his shop to him, Jankibai's statement appears very probable. It appears that there were separate *khatas* of Lakshman and accused 1 in the accounts; but it is notorious that among trading families it is usual to have separate *khatas* in the names of their different members. The question, however, is not whether Lakshman and accused 1 were joint or separate in estate. That is a question which does not arise in the present case. Assuming that, legally speaking, they were separate in estate, the question is whether their mutual relations were such as to make it improbable that Lakshman should have made a will giving one-half of the property to accused No. 1. Lakshman was a wealthy sowkar and had only a minor grandson as his heir. He was attacked with plague and there is nothing unnatural or improbable in that he should have thought of providing for contingencies in the event of his death by giving a half-share in the estate, including his trade, to his natural brother, who had been managing it, so that he (accused 1) being the only adult male relation whom he could trust, the trade could go on and everything managed properly in the minor's interests on Lakshman's death. The provisions of the will under these undisputed facts seem both natural and reasonable and tell in favour of its genuineness.

The events which happened on Lakshman's death must now be considered. The theory of the prosecution is that accused No. 1 and accused 8 made certain admissions shortly after the day of Lakshman's death, showing that there was no will. Some witnesses depose to that effect. Some of them say that accused No. 1 had deposited Rs. 1,800 with Lakshman and that on Lakshman's death he said माझा घात झाला "I am ruined;" and that he

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asked Chimabai, the widow of Lakshman, for repayment. Chimabai was at the time herself lying ill, being attacked with plague, and it does not appear probable that accused 1 Waman would have raised the question of repayment to her when she was fresh in the pangs of widowhood and herself lying ill. But there is the evidence of the Mámlatdár Rajacharya that the will was mentioned to him the very next day after Lakshman's death. It appears from the record that the Mámlatdár's evidence was sought to be impugned in the Sessions Court by the allegation that he had been siding with the accused, that he was a Brahmin and that he was indebted to one of the accused. The Mámlatdár has on his oath denied the indebtedness and there is no foundation, so far as we can judge upon the evidence, for the insinuation against him. It is a noticeable feature of this case that the Mámlatdár, the Chief Constable, and the Aval Kárkún have supported the case for the defence. The story of the prosecution is that Lakshman having died on Saturday, a relation of Jankibai, accompanied by a friend, came from Miraj to Khánápur and put labels on the property of Lakshman. The friend and witness Dhondbhat who have been examined say that they went to the Chief Constable and asked his help in putting seals on the property and that accused No 8 who was then present said that Lakshman had made no will. The Chief Constable denies that these people ever came to him. They also say that they went to the Mámlatdár and that the latter complied with their request and sent a Kulkarni to put seals on the property. The Mámlatdár denied all this on oath. The Aval Kárkún says that when he was called as a Panch on Tuesday (Lakshman having died on Saturday) to settle the dispute about the seals put on the property, Lakshman's will was mentioned. If the case for the prosecution is true, we have here a huge conspiracy to which eight respectable men, some of them of different castes from that of accused 1, and the Chief Constable, the Mámlatdár, and the Aval Kárkún, were parties. But the moment we come to examine the grounds on which this conspiracy is alleged to rest, we find that it stands on very slender basis. The fact that seals and labels were put on by Jankibai's relations is not denied for the defence; it is also common ground that a

dispute arose after they had been put on and that a Panch was called. The case for the prosecution is that during all this time no will was mentioned and that accused 1 had allowed the seals to be put on, but that the dispute arose in consequence of Chimabai's protest. But if accused 1 was so trustful and ready to give way to the people who came from Miraj, if he had no dispute to raise, where was the urgent necessity of putting seals on at all? According to the evidence for the prosecution he set up no claim, he put forward no will. The fact that seals were put on shows that a dispute arose as soon as the people from Miraj came, and if there was a dispute the legitimate inference is that it could only have been on account of the will. This inference is supported by the fact that a Panch was called to settle the dispute which had arisen on account of the seals put upon the property. One of the witnesses for the prosecution (Vishnubhat, Exhibit 10), says:—"The quarrel between accused 1 and the Phadakes arose out of the question of putting on those labels. Chimabai objected to this on Sunday night. Nevertheless the Phadakes put them on that night and when she found it out in the morning she was displeased. Accused No. 1 also objected strongly on Monday. It was over this dispute that the Panch was called." When the Panch were called, it is said, it was agreed that an inventory of the property should be made, but no inventory was made and the reason given is that accused 1 put off the making of an inventory. Evidence bearing on this part of the case is of so unsatisfactory a character that we cannot rest the convictions of the accused on it, and further it is opposed to the undisputed facts of the case. When the will was presented for registration, the Sub-Registrar called upon Jankibai to produce her evidence to show that the will was not genuine, and though she had then the assistance of her relations who were pressing her claim forward, she did not appear before the Sub-Registrar and adduce any evidence. The evidence that accused 1 removed ornaments and misappropriated property is, again, of a weak character, and even if it is believed it cannot affect materially the question whether the will is forged. As remarked by the Judge in his charge, it is not necessarily inconsistent with the *factum* of the will; the same remark

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applies to the evidence that he had concealed certain bonds, which evidence again is not free from suspicion. The only remaining point is that accused 1 agreed to a reference of the dispute to arbitration, but that again is no evidence that the will is not genuine. As pointed out by the Judge in his charge, accused 1 agreed to the reference on certain terms, one of which was that he should get Rs. 10,000 from the property. Such a conditional consent can by no means be construed into an admission that the will was forged. Besides, there was the chance of the will being attacked on the ground of its invalidity. Many motives lead parties to agree to the compromise of a dispute privately, and the chief among them is the buying of peace and the avoidance of litigation: and when they do so agree the natural presumption is not that each necessarily admits his claim to be false, but rather that each gives up and waives his extreme contention and consents to an amicable settlement by third parties as arbitrators.

The conclusion we have come to is that the prosecution has failed to prove the case against the accused, that the verdict is manifestly wrong; and indeed for the Crown no attempt was made to support the convictions on the evidence legally admitted. We must, therefore, set aside the verdict of the jury and acquit all the appellants and direct that they be discharged.

APPELLATE CRIMINAL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Batty.

1902. *September 4.*

EMPEROR *v.* MALGOWDA BASGOWDA.*

Sessions Judge—Jury—Summing up—Defective direction—Contentions placed before the Jury—Judge should not omit pointedly to call attention of the Jury to matters of prime importance especially if they favour the accused.

A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused, merely because they have been discussed by the advocate.

* Criminal Appeal No. 261 of 1902.