FULL BENCH.

ORIGINAL CRIMINAL.

Before Mr. Justice Russell, Acting Chief Justice, Mr. Justice Chandavarkar, Mr. Justice Batty, Mr. Justice Davar and Mr. Justice Beaman.

EMPEROR *v.* NARAYAN RAGHUNATH PATKI.* *1907. June 25.*

Criminal Procedure Code (Act V of 1898), section 162—Bombay City Police Act (Bom. Act IV of 1902), section 63—Indian Evidence Act (I of 1872), sections 24 and 167 - Amended Letters Patent, 1865, clause 26—Statement made by a witness to and taken down in writing by a Police officer—Admissibility in evidence—Confession of accused, admissibility of.

One P., an entry clerk in the General Post Office, Bombay, was charged with having committed theft in respect of a registered letter. S., a friend of the accused, had made a statement to a Police Officer which the latter had taken down in writing. At the trial S. denied having made the statement, whereupon, the Presiding Judge admitted the statement in evidence both to discredit S. and also as evidence against P. in that it contained statements made to the Police corroborating confessions made by P. These confessions were also used in evidence against P. On the application by P.'s Counsel, the Advocate-General certified under clause 26 of the Amended Letters Patent that the said document was wrongly admitted. On a review of the Full Bench.

Held, having regard to section 162 of the Criminal Procedure Code (Act V of 1898), the said document ought not to have been admitted or used in evidence against the accused.

Per RUSSELL, Ag. C. J. :—The document might be used to contradict the witness not by putting in the statement, but by putting it in the hands of the Police Officer to refresh his memory and to get him to contradict the statement of S.

Per CHANDAVARKAR, J. :—It is the statement contained in the writing which only could be used and that only to impeach the credit of such witness in the manner provided by the Indian Evidence Act (I of 1872).

Per BATTY, J. :—The writing might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

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*Case No. 11, Third Criminal Sessions of 1906. Reference to Full Bench on a certificate granted by the Advocate-General.

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Per BEAMAN, J. :—The writing ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting the witness.

The question was also raised by Counsel for the Crown whether under clause 26 of the Letters Patent the Court had power to review the case only *qua* the wrongly admitted evidence or had power to review all the rest of the case.

Held, by RUSSELL, AG. C. J., CHANDAVARKAR and BATTY, JJ.(DAVAR and BEAMAN, JJ. dissenting) that the Court has power to review the whole case.

Per DAVAR, J. :—Under clause 26 the Court is at liberty to review the case or part of the case for the purpose of determining the point or points of law which are either reserved for its opinion or certified by the Advocate-General to be wrongly decided. It is not open to the Court in review to go behind the record of the case and enter into an elaborate investigation as to whether each particular piece of evidence recorded by the Judge was or was not rightly admitted.

Per BEAMAN, J. :—If the party did not object, did not ask for a certificate in respect of evidence which is challenged for the first time after the trial, at the hearing before the Court of Reference, the objection comes too late.

The further question was raised by Counsel for the accused whether the confessions of the accused were irrelevant under section 24 of the Indian Evidence Act (I of 1872).

Held, the confessions were rightly admitted in evidence.

Per BATTY, J. :—It is not sufficient to render a confession irrelevant under section 24 that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.

Per DAVAR, J. :—In the absence of the point being reserved or certified by the Advocate-General the Full Bench has no right to sit in appeal on the decision that the confession was legally admissible in evidence.

REFERENCE and review of a case decided in the Third Criminal Sessions of 1906 of the High Court of Bombay by Russell, J., and a common jury on a certificate of the Advocate General under clause 26 of the Amended Letters Patent of 1865 obtained by the prisoner's counsel.

The accused Narayan Raghunath Patki, who was an entry clerk in the General Post Office, Bombay, was charged before Russell, J., and a common jury with having committed theft in respect of a registered letter No. 477, alleged to contain currency notes of the value of Rs. 80 and four Goa lottery

tickets. Before the commencement of the trial the accused had made two oral statements, one to his cousin, Anant Narayan, and the other to his immediate superior in office, Chattarsingh. Both these persons were examined as witnesses for the prosecution. The accused had also made a third statement to H. S. Hooper, Acting Presidency Post Master, who reduced it to writing and it was put in at the hearing as Exhibit B. It was as follows:—

EXHIBIT B.

Statement of Narayan Raghunath Patki, clerk, Inland Registration Department.

On the 9th December 1905 at about 7-30 p.m. Mr. P. W. Karandikar, Senior Clerk, Inland Registration Department, opened the B-3 (Ahmedabad) combined registered bag and transferred the contents to Shantaram Narayan, Checker. During the transfer of the letters one letter fell under the table. I picked up the letter and showed it to Mr. Bezonji, Joint Head Clerk on duty. When I picked up this letter no one observed me doing so. Mr. Bezonji told me to keep the letter with me. In the meantime my friend Mr. Shankar Vishnu Naik, a Clerk in the Accountant General's Office came to the window and called for me and gave me an ordinary packet containing a tin case to post it for Banda. Mr. Bezonji had seen that article and he took it from me, and it is now ascertained that the same was delivered at Banda as a registered article bearing No. 227 to the addressee, S. B. Kamat, who was the addressee of the ordinary packet received by me from my friend Mr. S. V. Naik who is the nephew of the addressee. On leaving the office at about 12 o'clock (noon) I asked Mr. Bezonji what was to be done with the registered letter in my possession which I had picked up from beneath the table, and he told me to keep it with me and told me that the ordinary packet given to me by my friend had been substituted by him (Mr. Bezonji) for the registered letter and he would see that the account was made correct. He told me to open this registered letter at home as he thought that registered articles for Goa generally contained valuables, and told me to bring the contents to him next morning in office. On arrival at my house I opened the letter and found that it contained three currency notes, one for Rs. 50, one for Rs. 20 and one for Rs. 10 and (four) 4 Goa lottery tickets, the value of which I forget. These tickets I destroyed. On the next morning, Sunday, December 10th, I came to office about 8 a.m. to hand over these notes to Mr. Bezonji whom I met in the verandah facing the Public Works Department, Secretariat, as arranged the night before, and I there handed over to him the whole of the contents of the letter except the lottery tickets. Mr. Bezonji gave me back currency notes to the value of Rs. 30. I refused to accept them but Mr. Bezonji forced me to take them saying "that if you will not take them I shall take

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your name that you have opened the letter" and I took them being afraid. About 8 days ago I came to know that after the lists of the 9th December had been checked and that the No. 227 was not traceable as received in the office, but was shown in the registered list as sent to Banda and that the receipt for the same had been called for from that office and the addressee had also been asked to give the name of the sender and office of posting. I consulted my friend Mr. S. V. Naik how to settle this matter, and he advised me to send my brother's son to Banda and settle with the addressee, not to give the name of the sender, and I accordingly sent him, and received a telegram from him on the 11th instant saying "Reached safely," "grandfather all rights," which meant that the addressee agreed not to give the name of the sender of the substituted letter which was delivered to him as a registered article and for which he had signed a receipt. I heard yesterday that the addressee had been summoned by the Police to give evidence in Court in the case now proceeding against Mr. P. W. Karandikar and fearing that the truth would leak out, I confessed the whole affair to my brother K. R. Patki, who thought it best to bring me before you to make a full statement of the case. Recorded by me this day.

(Sd.) J. HOOPER,
Presidency Post Master.
April 13, 06.

Witness, (Sd.) CHATTARSING.

(Sd.) NARAYAN RAGHUNATH PATKI.
13-4-06.

The accused's friend Shankar Vishnu Naik had also made a statement to one Narayanrao, a Police Officer, who took it down in writing. At the trial Shankar Vishnu Naik being questioned with respect to the statement, he denied having made it. Thereupon, Narayanrao, the Police Officer, was examined and was asked as to whether Shankar made the said statement and he having answered in the affirmative, the statement was recorded as Exhibit N. It ran as follows:—

EXHIBIT N.

Shankar Vishnu Naik.

I am a Gowd Saraswat by caste and am at present employed in the Accountant-General's Office on pay of Rs. 30. I know one Narayan Raghunath Patki for the last 5 years. I used to reside in Shantaram Kshatriya's chawl in Girgaum, along with Narayan Raghunath Patki. On the 9th December last, I was residing with Patki in the abovementioned chawl. I now reside with him at Matunga in a hut. About 4 months ago I purchased one box containing ring-worm ointment from Messrs. Bhica, Kalyan & Co., near the Jumma Mosque for 4 annas. I wrapped it up in a piece of paper and wrote the address S. L. Kamat, Banda, Sáwantwádi, thereon and gave it to Narayan Raghunath Patki at his room in Shantaram's

chawl and asked him to post it. He received it and I then left. I had purchased the ointment for Mr. S. B. Kamat who is my uncle. I then did not ask him anything about the ointment believing that it was duly despatched. I have not heard anything from my uncle S. B. Kamat for about a month. I expect a letter from him. On about Saturday, the 7th instant, at about 8 a.m. Narayan told me that he had taken out a registered letter about 4 months ago which contained some notes and cheques; and sent the packet given by you to me in its stead and asked me what to do. I advised him to send his brother's son to Banda to tell S. B. Kamat not to disclose my name to the Postal Officer. Next day on morning at about 7 a.m., I, Narayan and Bhalchandra met together in open space nextto hut when I told Bhalchandra in the presence of Narayan what Narayan had done. I and Narayan then asked Bhalchandra to arrange either to go personally or send some one to Banda and ask the addressee not to disclose the name of the sender. We then asked Bhalchandra to send us a wire in code words informing the result.

In his charge to the jury the presiding Judge used the said statement not merely for the purpose of impeaching Shankar's credit, but also as evidence against the accused, because it contained statements made by Shankar to the Police, corroborating the accused's confession. The jury unanimously found the accused giulty but recommended him to mercy on the ground that the Post Office Service was greatly defective and exposed him to many temptations. The presiding Judge, thereupon, sentenced the accused to undergo rigorous imprisonment for six years.

Some time after the said conviction and sentence, the Advocate-General at the request of Mr. Murzaban, the prisoner's Counsel, certified under clause 26 of the amended Letters Patent, 1865, to the following effect:—

ADVOCATE-GENERAL'S CHAMBERS,
HIGH COURT:
Bombay, October 16th, 1906.

Whereas one Narayan Raghunath Patki was prosecuted and convicted at the Third Criminal Sessions of 1906 holden in the High Court of Judicature at Bombay and was upon such conviction on the 20th day of July 1906 sentenced by the Honourable Mr. Justice Russell to suffer rigorous imprisonment for a term of six years, and whereas at the trial of the said Narayan Raghunath Patki it was decided by the said learned Judge that a certain document marked as Exhibit N and purporting to be a written record of a statement made by one Shankar, a witness for the prosecution

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n the case, and taken down by one Narayanrao, a Police Officer, was admissible in evidence against the said Narayan Raghunath Patki, and the same was so admitted in and used as evidence against the said Narayan Raghunath Patki. Now I, at the request of the counsel for the said Narayan Raghunath Patki, certify that in my judgment the said document was wrongly so admitted and that there is accordingly an error in the decision of a point of law decided by the said learned Judge.

(Signed) G. R. LOWNDES,
Advocate-General, *Pro-tem.*

Owing to the said certificate the case was fixed for a review by a Full Bench composed of Russell, Acting C. J. and Chandavarkar, Batty, Davar and Beaman, JJ.

Robertson (with *Murzaban* and *C. A. Rele*) for the prisoner:—The written statement, Exhibit N., of the witness Shankar taken by the Police Officer was not at all admissible in evidence and could not be used against the accused. If the document was not admissible, its contents also were equally so. Section 162 of the Criminal Procedure Code is incorporated *verbatim et literatum* in the Bombay City Police Act of 1902. In the present Criminal Procedure Code, section 162 is amended. Even before the section was amended, such a statement was not allowed to be used by the accused on his behalf, *a fortiori* it could not be used against him: *Queen-Empress* v. *Sitaram Vithal* [1], *Queen-Empress* v. *Madho* [2], *Queen-Empress* v. *Taj Khan* [3], *Isab Mandal* v. *Queen-Empress* [4], *Queen-Empress* v. *Haribai* [5].

The statement was used to fill up a gap in the evidence against the accused and was read to the jury. The dangers of the use of such statements are pointed out in *Isab Mandal* v. *Queen-Empress* [4].

If the said statement is excluded then there is no other evidence against the accused except his confession and that confession also is not admissible. It was made by the accused to his superior officer, who, it appears, had induced the accused to make it. There are certain facts in the statement which were known only to Chattarsingh, and it bears eminent traces of suggestions

(1) (1887) 11 Bom. 657.
(2) (1892) 15 All. 25 at p. 26.
(3) 894) 17 All. 57 at p. 59.
(4) (1900) 28 Cal. 348 at p. 351.
(5) (1897) Unrep. Cri. C. p. 935.

coming from him. There was enmity between Bezonji, mentioned in the confession, and Chattarsingh and the latter tried to get the accused to implicate the former in the commission of the offence. The confession of the accused implicated Bezonji, but the presiding Judge found that Bezonji was innocent. This fact itself indicates that the accused was induced by Chattarsingh to make the confession. There are also certain other matters in the confession which were found to be untrue. Where, therefore, a confession contains facts which are proved to be untrue and which were chiefly induced by the accused's superior officer, it cannot be admitted as evidence against him.

The confession is an extra judicial one. It is irrelevant under section 24 of the Evidence Act, being obtained by means of inducements, threats or promises. All the evidence in the case contradicts the details of the confession. It was retracted when the accused pleaded not guilty. There is not a single case in which, the facts in a confession having been found to be untrue, a conviction has taken place: *Queen-Empress* v. *Mahabir* [1], *Queen-Empress* v. *Gharya* [2].

Even if it be held that the accused has committed an offence, he ought to have been charged under section 68 of the Indian Post Office Act.

Wadia (with *E. F. Nicholson*, Public Prosecutor) for the Crown:—The statement of Shankar, Exhibit N., was not originally let in for the purpose of using it against the accused. It was put in merely to contradict Shankar when, in the Sessions Court, he denied having made it to the Police Officer. The present Criminal Procedure Code came into force in the year 1898. The cases cited for the accused are all cases decided prior to that year. Besides they only show that such a statement is admissible for the purpose of corroborating or contradicting a witness.

The Court sitting in revision cannot go into the question whether the confession was admissible or not. The Advocate-General has certified only that the statement of Shankar taken down by the Police Officer was not admissible in evidence.

(1) (1895) 18 All. 78. (2) (1894) 19 Bom. 728.

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Therefore this Court cannot now review the whole case and determine whether other evidence was rightly admitted or not: clause 26 of the Amended Letters Patent. Now the only point which can be considered is that on which the certificate was granted.

Robertson, in reply:—This Court can go into the whole evidence in the same manner as the Court of the Crown Cases Reserved in England. Clause 26 of the Amended Letters Patent received a wide interpretation in *Reg.* v. *Navroji Dadabhai*(1). See also *Imperatrix* v. *Pitambar Jina*(2), *Queen-Empress* v. *O'Hara*(3), *Queen* v. *Hurribole Chunder Ghose*(4), *Subrahmania Ayyar* v. *King-Emperor*(5).

RUSSELL, AG. C. J.—The accused in this case one Narayan Raghunath Patki, an Entry Clerk in the General Post Office, Bombay, was charged before Russell, J., and a common jury that he being an officer of the Post Office, *viz.*, a clerk in the Inland Registration Department, committed theft in respect of a registered letter 477, containing currency notes of the value of Rs. 80 and four Goa lottery tickets, which was in the course of transmission from Ahmedabad to Goa and thereby committed an offence punishable under section 52 of Act VI of 1898, and was found guilty and sentenced to six years' rigorous imprisonment.

On the 16th October 1906, the Acting Advocate-General Mr. Lowndes certified that a certain document marked as Ex. N. and purporting to be the written record of a statement made by one Shankar, a witness for the prosecution in the case, and taken down by one Narayanrao, a Police Officer, was wrongly so admitted and there was accordingly an error in the decision of a point of law decided by the said learned judge.

The said Ex. N is to be found at page 50 of the printed book herein and was in the first instance admitted to contradict the said witness Shankar, but it is not necessary further to refer to this matter as we are all of opinion that having regard to the terms of section 162 of the Criminal Procedure Code the said

(1) (1872) 9 Bom. H. C. R. 368.
(2) (1877) 2 Bom. 61.
(3) (1890) 17 Cal. 642.
(4) (1876) 1 Cal. 207.
(5) (1901) 25 Mad. 61 at p. 74.

document ought not to have been admitted or used in evidence against the accused, although, no doubt, it might be used to contradict the witness not by putting in the statement but by putting it in the hands of Narayanrao to refresh his memory and get him to contradict the statement of Shankar.

It remains for us, therefore, to consider whether there was sufficient evidence *aliunde* in support of the conviction.

A question has been raised, however, under clause 26 of the Letters Patent as to the meaning of the words therein: "The said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law." Does this mean that the High Court is to have power to review the case only *qua* the wrongly admitted or wrongly rejected evidence, or does it mean that the High Court has power to review all the rest of the case? *e.g.* in the present instance can this Court go into the question of fact—as asked to do by the prisoner's counsel—whether the prisoner's confession and especially Ex. B were induced by a threat, promise or inducement and therefore are irrelevant under section 24 of the Evidence Act?

Upon this question it must first be observed that it has been held that section 167 of the Evidence Act applies to criminal trials by jury in the High Court—see *Reg.* v. *Navroji Dadabhai*[1], *Queen* v. *Hurribole Chunder Ghose*[2], *and Empress* v. *Pitamber Jina*[3].

Section 167 provides that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." "Evidence" means and includes (so far as is material to the present case) by section 3 of the Evidence Act "all statements which the Court permits or requires to be made before it by

(1) (1872) 9 Bom. H. C. R. 358. (2) (1876) Cal. 207.
(3) (1877) 2 Bom. 61, 65.

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witnesses in relation to matters of fact under inquiry." By section 5 "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others." By section 24 "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of it appears to the Court to have been caused by any inducement, threat, etc."

It appears to me therefore that to enable this Court to arrive at a conclusion that there is in this case sufficient evidence (besides the rejected evidence) to justify the convictions this Court must make up its mind as to whether the confessions of the accused are irrelevant within section 24. Further it would I think be difficult to put a different meaning on the word "review" in a criminal case from that which is put upon it in a civil case. See section 630 of the Civil Procedure Code and *Sainal Ranchhod* v. *Dullabh Dvarka*[1].

In the present case this question arises with reference to certain confessions made by the accused, for it was argued by the prisoner's counsel that certainly the confessional statement Ex. B had been obtained by the witness Chattarsingh from the accused by means of inducement, threat or promise.

As above pointed out, the prisoner's counsel laid great stress upon the Ex. B which is to be found at pages 42 and 43 of the printed book. But in my opinion the evidence shows that there were not one but three statements in the nature of confessions made by the accused which were deposed to at the hearing. The first is by the witness Anant. He deposes:—

> Accused spoke to me the next day Wednesday. Accused said I must go and state all these things to Chattarsingh, *i. e.* all that had happened in this case. Then accused in presence of Krishnaji and Shankar and Keshav told me that he had taken the letter in connection with which Karandikar is being tried. After that I asked accused why did you not mention this up to this time. How is not mentioned your name up to this date. He said up to this date I remained quiet because up to this time the Police had not traced the addressee of the substituted article. He told me the name of the addressee. He said Shankar had given him a bottle of ring-worm ointment. And Shankar had

[1] (1873) 10 Bom. H. C. R. 360

written the address and everything on the cover of the bottle. Shanker said to me I gave the phial to the accused telling him I had no money and he better post it himself at the Office. Accused said I then avoiding the eyes of the entry clerk substituted that article and Pezonji saw me substituting that Article. After that the accused said he had brought the registered letter home. He said, the registered letter contained currency notes and Goa Lottery tickets. The accused said in the evening I opened the registerd letter, burnt the envelope and the lottery tickets and took the notes. I then asked accused why he did not tell this to Shanker. And was he not afraid to substitute the ointment phial *i. e.* of being arrested. Accused said what is done is done. But if you can see any way for me to get out kindly find it out. Krishnaji was there at the time. He said why did you do so. Accused said I am not able to say why I did this or how I did it. I then advised the accused to confess. Now you have done this confess. His brother also gave him the same advice. Accused said Krishnaji says the same thing to me. This happened on Wednesday. Then on Thursday night accused said to us I intend to confess because if I confess I may get a lighter punishment. He said up to this time the Police or anybody else had only suspicion of me, but now that they have sent a wire to Banda the addressee might give the name of Shankar as the sender of the bottle because Shankar's maternal uncle had written to him to send such a bottle. His name is Kamat. I asked him particulars, I asked him where he got the receipt form for the substituted article. He said there was a receipt lying on the table of the entry clerk and on his very receipt I placed the substituted article. Then I asked him to account for the stamp impressions on the receipt.

Now it appears to me that there is no reason whatever why I should disbelieve witness Anant, who is a cousin of the accused, with regard to this evidence which he gives. In fact, he, as is shown in his cross-examination, was certainly not very favourable to the prosecution. In my opinion, I would not be justified in saying that the statements in the nature of confession made by accused to Anant were obtained in any way improperly and are not relevant and admissible according to law.

The next confessional statement is that deposed by Chattarsingh corroborated as it is by the witness Sabnis. That shows that on the Good Friday, the accused deliberately went with Anant and Krishnaji, his elder brother, to Chattarsingh at Dadar Plague Health Camp where he was then staying. There does not appear to me to have been any inducement, threat or promise made by Chattarsingh or any one else to induce the accused to make his statement to Chattarsingh, and I see no

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reason to disbelieve the latter when he says: "I told him (the accused) it was no use their coming to me but they should have gone to Hooper. Accused and his brother said that as I was their immediate superior they had come to me. I asked them to go with me to the Presidency Postmaster, Hooper. Those three men came with me. The two Patkis and I saw Hooper at the Post Office. He lives there." If we believe this evidence, then it is clear that Chattarsingh did not hold out any inducement, threat or promise in respect of these confessional statements. Chattarsingh further says and we really see no reason to disbelieve him that up to Good Friday he had never suspected the accused.

I then come to the Ex. B. Mr. Robertson for the accused laid great stress on the mention of Bezonji in that statement, and argued that inasmuch as Bezonji and Chattarsingh were on bad terms with each other, Bezonji's name was introduced at the instance of Chattarsingh; but if the witness Anant is believed it is evident that Bezonji's name was mentioned by the accused to him two days before the accused saw Chattarsingh on Good Friday, because Anant at page 15 says "Accused spoke to me the next day Wednesday .... Accused said I then avoiding the eyes of the entry clerk substituted that article and Bezonji saw me substituting that article." The inference I would draw from this is that the accused was desirous of excusing himself as much as possible by making it appear as if Bezonji his superior officer knew of his having taken this letter.

Another point which arises on the confessional statement to Anant and the Ex. B. is that it clearly appears in both of them that what really induced the accused to give himself up was that he was afraid that S. B. Kamat, the addressee of the parcel, which was sent to Banda, might disclose the name of the sender and the office of posting. I see no reason for holding that with regard to the statement as to the parcel sent to Banda any promise, threat or inducement was held out to the accused, and it appears to me clear for what purpose that parcel was used. It is proved that the No. 2316 which appears on Ex. D was taken from the receipt attached to the registered parcel addressed to Mr. Jones of the Ship Ollifanta by Sea Post. The name

Banda which appears on Ex. D was evidently taken from the address on the parcel which was sent to Banda (as the clerk Shantaram says) which was opportunely handed in to the accused on the morning when the registered article 477 disappeared. It is also clear why No. 227 was put on the parcel to Banda instead of 477; because if 477 had been put upon that parcel it would have been traced to Banda at once, and, when it was found to contain ringworm powder instead of notes and lottery tickets, the theft of 477 in Bombay would have been at once disclosed.

In my opinion, therefore, no good ground has been shown for impugning any of the confessional statements which were tendered against the accused, and which were evidently made with the object of the accused being as lightly dealt with as possible. The conviction must, therefore, stand. But accepting the views of my learned colleagues I think justice will be met if the sentence is reduced from one of six years' rigorous imprisonment to one of three years' rigorous imprisonment.

CHANDAVARKAR, J.—The first question is whether the writing, Ex. N, which contains the statements alleged to have been made by the witness Shankar to a police officer in the course of the investigation of this offence, was rightly admitted in and used as evidence. The terms of section 63 (1) of the Bombay City Police Act, No. IV of 1902, which apply to such writing, provide in clear terms that such writing cannot be *used* as evidence, subject, however, to two exceptions, one mentioned in the proviso to the section and the other in clause (2) thereof. Clause (2) has no application here. The writing would be admissible in evidence, if at all, only under the terms of the proviso. But whether we

(1) The section runs as follows:—63. (1) No statement made by any person to a police officer in the course of an investigation under this Act shall, if taken down in writing, be signed by the person making it nor shall such writing be used as evidence.

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

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read the two parts, of which the proviso consists, conjunctively or distributively—a point on which it is unnecessary to express any opinion here—it is the statement contained in the writing which only could be used and that only to impeach the credit of such witness in manner provided by the Indian Evidence Act. But at the trial the writing, Ex. N, was used by the presiding Judge in his charge to the jury, not merely for the purpose of impeaching Shankar's credit, but also as evidence against the prisoner, because it contained statements made by Shankar to the police, corroborating the prisoner's confession. That use of the *writing* as evidence against the prisoner is opposed to the express terms of the section and must be held to have materially affected the deliberations of the jury in arriving at their verdict of guilty.

We must, therefore, exclude Ex. N from the evidence in the case and consider whether the evidence, which remains on the record after such exclusion, is sufficient to sustain the conviction.

It is conceded before us by the Crown that the evidence against the prisoner lies mainly in three confessional statements made by him on three different occasions—the first to his cousin, the second to Chattarsingh, and the third to Mr. Hooper. And the question is whether these confessions are proved to be true.

Mr. Robertson, the learned counsel, who has argued before us the case for the prisoner, has asked us to go into the preliminary question as to the admissibility in evidence of these confessions and to exclude them altogether from the record upon the ground that they are irrelevant under section 24 of the Indian Evidence Act.

On the other hand, for the Crown it is contended by Mr. Wadia that this question of the admissibility of the confessions in evidence is a point of law, which, not being included in the Advocate-General's certificate given under section 25, we are precluded from considering by the terms of that section.

This contention is based upon an obvious fallacy. It assumes that every question relating to the admissibility of evidence is necessarily a point of law. The assumption seems to be based upon a misconception of the rule that it is the office of the

Judge to decide questions of law and of the jury to decide questions of fact. While that is no doubt the rule, it does not follow that every question which, according to law the Judge has to decide, is and must be a question of law, not a question of fact. As pointed out by the learned editor of Best on Evidence (8th edition, page 86), "that *matter of law* is distinguished from *matter of fact* in accordance with the different functions of judge and jury, does not seem entirely accurate. All questions of law (except, perhaps, to a limited extent, in criminal cases) are for the Court; all questions of fact are not for the jury.....so all facts preliminary to the admissibility of evidence are for the Court.....So whether a confession is voluntary." And this is in accordance with the scheme of the Indian Evidence Act, according to which a confession is inadmissible, only if the Court considers it to have been induced by illegal pressure. Section 24 says it is not to be received in evidence if it *appears* to the Court to have been so induced. The word "appear" is important as importing judicial discretion. It shows that the Court has to decide the preliminary question of admissibility on a consideration of the evidence and surrounding circumstances. Where it so decides, the question decided is a question of fact. If, of course, upon the evidence as it stands—taking the evidence to be credible and apart from any question of the weight to be attached to it—any question of the admissibility of the confession arises in point of law, it is otherwise. That was the case in *Reg.* v. *Navroji Dadabhai*[1]. There the Full Bench did not weigh the evidence relating to the confession but accepting it as credible went into two pure questions of law—first whether Wainwright was a person in authority and whether the words he uttered amounted in law to an inducement. So also a Court's power to admit secondary evidence under Chapter V of the Evidence Act. Whether secondary evidence is admissible or not has to be decided on evidence and its decision is a question of fact—not of law—one of which the Privy Council say that it is proper to be decided by the judge of first instance, depending very much on

(1) (1872) 9 Bom. H. C. R. 358.

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his discretion and their Lordships hold that "*his conclusion* should not be overruled except in a very clear case of miscarriage." *Srimati Rani Hurripria* v. *Rukmini Debi* [1].

The question, therefore, whether the confessions of the prisoner were admissible under section 24 of the Evidence Act, had to be decided by the learned judge who presided at the trial, on his appreciation of the evidence relating to it as a preliminary and collateral question. And he decided it as a question of fact, holding in effect that the evidence did not *appear* to him to justify the exclusion of the confessions upon any of the grounds specified in section 24. In so deciding he exercised the discretionary power vested in him by the terms of the section: there is no point of law; and the simple question before us is, not whether we, acting as a Court of Reference and Review under section 26 of the Letters Patent have power to revise that exercise, but whether, assuming for the sake of argument that we have that power, such a case is made out as ought to be made out before a Court of Review and Reference interferes with the discretion of a lower Court. It is upon that narrower ground that the point now under discussion must and can be disposed of and it is not necessary to decide the broader question raised—whether we have jurisdiction under clause 26 of the Letters Patent to decide any other *point of law* than that contained in the Advocate-General's certificate. I say it is not necessary and I declined to consider it because there is no point of law as such about the admissibility of the confession before us. The point raised turns on disputed *facts*. The nature and character of the power which a Court trying a criminal case exercises in admitting in or excluding from evidence a confession under section 24 of the Evidence Act is described by West, J., in the judgment of this Court in *Queen-Empress* v. *Vijialakshmi* [2], as discretionary. "It was a discretion," said West, J., "which was left to the Court to which the evidence was tendered, and it was only in the exceptional case when the Court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving

[1] (1892) L. R. 19 I. A. 79 at p. 81. [2] (1881) Unrep. Cr. C. 163, 164.

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the confession, that they could interfere." No such case is made out before us—none is even suggested by the learned counsel for the prisoner. His argument is in effect merely that the presiding Judge misappreciated the evidence on the question of admissibility and wrongly exercised his discretion. That is not enough to justify our interference with that discretion. There is no law about it. In this opinion I am further fortified by the decision of the Privy Council already cited.

The confessions, therefore, cannot be *excluded* from the evidence in the case. We must consider them and assess their *value* as evidence properly admitted to see whether they are true confessions. What the presiding Judge at the trial had to decide in the exercise of his judicial discretion was whether the confessions appeared to him to be *voluntary* and he has so decided. What we have to decide is, are they proved to be *true ?* No doubt in assessing the value of a confession as sufficient evidence and finding out whether it is true or false, various considerations do and must enter, of which one may be and generally is whether it was voluntary or not. But the question as to its voluntariness comes in there only as a subordinate though material element in the main question of the credibility of the proof. And hence the rule of law stated by Mr. Taylor in his work on Evidence (paragraph 791*) that "deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law." So it has been ruled in the American Courts that after the Court has ruled that the confession is admissible, the accused may ask to have the jury disregard it if they think it not voluntary : *Income* v. *Culver*[1].

Thus approaching the question of appreciation of the evidence which remains after excluding Exhibit N, I have no reasonable doubt as to the guilt of the prisoner. His first confession was to his cousin Anant whose evidence-in-chief is marked by coherence of statement and has not been in the slightest degree shaken in cross-examination. The only thing suggested against him is that he is a subordinate of Chattarsingh and that to please

* [Paragraph 865, *in the Tenth Edition.*—ED.]

(1) 126 Mass. 464.

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the latter, Anant and some other members of the family arranged that the prisoner should concoct a story implicating himself in the crime. The suggestion is more or less speculative and is not sufficient to meet the positive sworn testimony of Anant himself. The next confession was to Chattarsingh and it is corroborated by the independent testimony of Sabnis, who is a disinterested witness except that, it is suggested he is a friend of Chattarsingh. It is a mere suggestion as to which he was not even cross-examined. As to the last confession, that made to Hooper, some portions of it have been commented upon by Mr. Robertson by the light of the evidence adduced for the prosecution relating to Bezonji's alleged complicity in the crime. The evidence as to Bezonji may or may not be true. If, as is urged for him, the prisoner confessed merely to inculpate Bezonji, the question still remains why should he have inculpated himself? The prisoner is not illiterate. He knows English. He must have known the consequences. And then the Banda incident is, in my opinion, decisive of the truth of the confessions and the prisoner's complicity. The facts as to it, appearing in the evidence, stand unchallenged and uncontradicted. The prisoner is a native of Banda. His friend Shankar has a friend in one Kamat at Banda. On the morning of this crime, Shankar gave to the prisoner a bottle containing ring-worm powder to be sent by post—not registered post—to Kamat at Banda. That article came to have a false number and was despatched by registered post as having come from Colaba, though it had been delivered by Shankar to the prisoner at the General Post Office. It is that article which was substituted for the missing article bearing No. 477. These facts stand out in the case uncontradicted and the coincidence between them and the missing of the article bearing No. 477 is striking, in point of time, place and circumstance. I pointedly asked Mr. Robertson for some explanation of the coincidence consistent with the theory of the prisoner's innocence but it is at that crucial point that Mr. Robertson's argument failed. He could suggest no satisfactory explanation. Upon the whole, I am of opinion that the evidence on the record after the exclusion of Exhibit N is sufficient to support the conviction, and I would affirm

it. But having regard to all the circumstances of the case especially to the impression generally conveyed by the evidence that the crime could not have been committed by the prisoner without the aid and complicity of some others in the Post Office and that it is not quite clear whether he was not a tool in the hands of those others I would reduce the sentence to three years' rigorous imprisonment, which cannot err either on the side of undue severity or undue leniency.

BATTY, J.—I concur in the results of the two judgments which have just been delivered. I concur in thinking that the writing to which the statement of *the witness* was reduced, could not be used as substantive evidence against the *accused*. No doubt it might have been used for the purpose of refreshing the memory of the witness cross-examined as to the fact of the statement either on behalf of the prosecution or on behalf of the defence, provided that it was treated by the prosecution only for the purpose of impeaching the credit or in corroboration of the witness who made it.

I do not think that it is necessary to discuss the question of the powers and duties of this Court, acting under clause 26 of the Letters Patent. In the first place it does not appear to me that any objection has been taken as to the direction of a point of law by the presiding Judge as to the confession of the accused. Section 24 of the Evidence Act requires that a confession is to be treated as irrelevant if it appears to the Court to have been caused by any inducement, threat, or promise, etc. The Judge did not give any direction opposed to that principle of law, but only held that as a matter of fact the confession did not appear to have been improperly induced within the meaning of that section. The decision, therefore, with regard to the relevancy of that confession appears to me to be entirely one of fact and has no connection with legal principles laid down in section 24; the operation of which is not attracted by the facts found. If it were necessary to consider the effect of that confession, I think that there could be no doubt that the evidence was very far from establishing that any inducement was given by Chattarsingh to obtain the confession that was made. The

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arguments which have been addressed to us no doubt indicate enmity between Chattarsingh and Bezonji, and this might account for the action of Chattarsingh and possibly of the accused in introducing the name of Bezonji into the confession. But the enmity to Bezonji affords no explanation of the motive for the confession itself. It is not sufficient to render a confession irrelevant under section 24 that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced. So far as I have been able to see from the evidence, there was no reason why Chattarsingh should have induced or ground for supposing he would have been able to induce the accused rather than any other of his subordinates to make a confession of a crime.

I also concur in the proposed reduction of the sentence.

DAVAR, J.—In July 1906 the accused Narayan Raghunath Patki was, at a trial held at the Criminal Sessions of the High Court, convicted of the offence of having committed theft of a Registered letter and sentenced under section 52 of Act VI of 1898 to suffer rigorous imprisonment for six years.

On the 16th of October 1906, the acting advocate-General certified that in his judgment the statement of Shanker, a witness for the prosecution, taken down by one Narayenrao, a Police Officer, was strongly admitted in evidence and that there was "accordingly *an error* in the decision of *a point* of law decided by the said learned Judge."

On the certificate of the acting Advocate-General the case came on before us in this Court. It appears that Shanker's statement to Narayenrao was not only admitted in evidence but was *used* as evidence against the accused. We are unanimously of opinion that this statement was not evidence against the accused and must be eliminated from our consideration in judging of the guilt or innocence of the accused. It is therefore unnecessary for me to discuss this question further.

Under clause 26 of the Letters Patent on the above certificate being granted this Court has "full power and authority to

review the case, or such part of it as may be necessary and finally determine *such point* or *points* of law and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right."

Having decided the points covered by the certificate in favour of the accused it becomes necessary for this Court to consider whether the sentence passed on the accused should or should not be set aside or altered. Clause 26 confers no power on this Court to order a fresh or new trial and therefore we have to look to section 167 of the Evidence Act—which has been held to apply to criminal trials—for guidance as to the further course to be pursued by this Court. That section says that we are not to reverse the decision in any case in which evidence is improperly admitted if it shall appear to the Court that independently of the evidence objected to there is *sufficient evidence* to justify the decision.

Mr. Robertson, who appeared for the accused and argued the case most ably for him, has contended before us that independently of Exhibit B, which is the confession of the accused made before Mr. Hooper the Presidency Post Master, there is no evidence to justify a conviction. As to the confession he contended that it was manifestly untrue, that it was obtained by inducements, threats and promises, and that the learned acting Chief Justice who presided at the trial was in error in admitting it as evidence against the accused. He asked use to eliminate the confession from our consideration and to hold that it was improperly admitted in evidence at the trial of the accused.

It must here be noted that this question of the admissibility of the accused's confession was most fully and elaborately argude and the learned Judge who tried the case did not decide the question of its admissibility till he had heard the whole of the evidence and given counsel for the accused all opportunities to satisfy him that it was improperly obtained and was therefore inadmissible. He decided this question against the accused. No application was made to the Court originally trying the accused to reserve the question, as to whether the confession was legally

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admissible in evidence against the accused, as provided by clause 25 of the Amended Letters Patent. There is no certificate before us from the Advocate General that the admission of the confession was in his opinion an error of law on the part of the learned Judge. It is now before us as a piece of evidence. Is it open to us now to go into the question of its admissibility? Mr. Robertson argues that we are empowered to review the case and therefore it is open to us to go into the question and decide for ourselves whether the confession is relevant under section 24 of the Evidence Act, and he has placed before us a minute analysis of the evidence to show that it was improperly obtained. I am of opinion that in the absence of any reservation of this point under clause 25 or any certificate from the Advocate General under clause 26 of the Amended Letters Patent we are precluded from reopening the question which was decided by the learned Judge presiding at the trial. The words "review the case" in clause 26 must in my opinion be read with the words that follow, *viz.*, "or such part of it as may be necessary and finally determine *such* point or points of law". Under clause 26 it seems to me that we are at liberty to review the case or part of the case for the purpose of determining the point or points of law that are either reserved for our opinion or are certified by the Advocate General to be wrongly decided. Then again under section 167 of the Evidence Act all that we have to do after rejecting the piece of evidence complained of as being improperly admitted is to see if there is "sufficient evidence" to justify the decision. This confession is *evidence* recorded in the case. Its admissibility has been adjudicated upon. We are not a Court of appeal in the ordinary sense of the term. I do not think it is open to us under the present circumstances to go behind the record of the case, scrutinize every piece of evidence, and enter upon an elaborate investigation as to whether each particular piece of evidence recorded by the learned Judge and to which the accused's counsel *now* takes exception was or was not rightly recorded. Such a course does not appear to be intended to be followed by clause 26 of the Letters Patent and there is nothing in section 167 of the Evidence Act to justify such a procedure.

In support of his contention on this point the learned counsel for the accused has cited before us five cases, namely, *Reg.* v. *Navroji Dadabhai*(1); *Imperatrix* v. *Pitamber Jina*(2); *Queen* v. *Hurribole Chunder Ghose*(3); *Queen-Empress* v. *O'Hara*(4); *Subrahmania Ayyar* v. *King-Emperor*(5).

I have read all these cases and carefully considered them. I do not find anything in them to alter the views I have expressed on this point.

In the case of *Reg.* v. *Navroji Dadabai*(6), the accused Navroji, a travelling auditor in the service of the G I. P. Railway, was with another man charged with having committed criminal breach of trust in respect of *two* sums of money and they were both charged with aiding and abetting each other in the commission of the two offences. Navroji was convicted of both the offences and at the instance of his counsel a question was reserved as to whether one of the exhibits in the case was properly admitted in evidence. That exhibit had reference to only one of the charges. The principal question argued was whether the words used by Mr. Wainwright which led to the accused writing out a receipt which was the exhibit alleged to be improperly admitted were such as to constitute an inducement and whether the person using the words was a person in authority within the meaning of section 24 of the Evidence Act. The Court consisting of Sargent, C. J., and Bayley and Green, JJ., came to the conclusion unanimously that the exhibit was improperly admitted. The Chief Justice and Mr. Justice Green held that the Court had power to review the whole case and on a review of the whole case they came to the conclusion that the exhibit did not touch the second head of the case and they affirmed the conviction on the second head. Mr. Justice Bayley dissented and entered his strenuous protest against the assumption of such powers. He was of opinion that the conviction and sentence should be quashed. Now although the Court in this case by a majority of two to one went into a review of the whole case, they reviewed the same as a whole as it was

(1) (1872) 9 Bom. H. C. R. 358, 376.
(2) (1877) 2 Bom. 61.
(3) (1876) 1 Cal. 267.
(4) (1890) 17 Cal. 642.
(5) (1901) 25 Mad. 61, 74.
(6) (1872) 9 Bom. H. C. R. 358.

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placed before the jury in the Sessions Court. There was no question here of excluding any portion of the evidence recorded in the case except the exhibit in respect of which the point was reserved. The Court did not go into the question of relevancy or admissibility of the evidence which remained after eliminating Exhibit E which was held to be improperly admitted. The question which arises in this case never arose in that case I have carefully considered the passages read to us from Sir Charles Sargent's judgment by Mr. Robertson. I find nothing in them which is inconsistent with the view I take in this case. I grant that we must review the whole case and judge for ourselves whether on the evidence that remains the conviction ought to be affirmed or quashed. All I say is we cannot go into the question whether any portion of the remaining evidence was properly admitted more especially when that question has been argued before the trying Judge and decided by him. I say that in the absence of the point being reserved or certified by the Advocate-General we have no right to sit here in appeal on our learned colleague's decision that the confession was legally admissible in evidence

In the case of *Imperatrix* v. *Pitamber Jina*[1] the question reserved for the opinion of the High Court was whether the evidence of the first prisoner's confession had been rightly excluded. In this case all that was held was that the Court had power to review the whole case and that section 167 of the Evidence Act applied to criminal trials before the High Court—proposition of law with which I am in entire accord.

The next case relied on by Mr. Robertson is that of the *Queen* v. *Hurribole Chunder Ghose*[2]. This case came before the Court on a certificate of the Advocate-General that a confession made by the accused was under section 25 of the Evidence Act not admissible in evidence. All that this case decides again is that the Court has power to review the whole case on the merits and affirm or quash the conviction. It would not be fair to omit to notice that at page 218 Sir Richard Garth in his judgment makes use of the words "evidence *properly received*" and on the same

(1) (1877) 2 Bom. 61. (2) (1876) 1 Cal. 207.

page Mr. Justice Pontifex speaks of "*admissible evidence in this case.*" A careful study of the judgments however leaves no doubt whatever on my mind that both the learned Judges are here referring to the remaining evidence in the case after excluding the evidence which they held to have been *improperly received* and *not admissible in the case.*

The expressions are used to distinguish the unchallenged evidence that remained from the evidence that was excluded. No question whatever here arose as to rejecting or excluding any other evidence except the confession in respect of which there was a certificate.

The next case, *Queen-Empress* v. *O'Hara* (1), was a case of misdirection to the jury. Mr. Robertson has not drawn our attention to any particular passage in the judgment on which he relies, and after perusing the case with attention I fail to find anything in it that supports his contention. The only passage in the judgment of the Chief Justice Sir Comer Petheram which can have any bearing on this point is at page 667 where he says:—"In the view we take of the case, it is unnecessary to deal with the argument for the prosecution as to the powers of the Court acting under section 26 of the Charter. We take it to be clear that in a case of misdirection such as this, and of improper reception of evidence such as took place in the present case, this Court may and ought to exercise its powers of review." This proposition has not been challenged and I have failed to find anything in the case that lends any support to the contentions of the learned counsel for the accused.

The last case relied on by the learned counsel for the accused is the case of *Subrahmania Ayyar* v. *King-Emperor* (2). This was a case of misjoinder of charges and the Privy Council held that the trial having been conducted in a manner prohibited by law was altogether illegal and the conviction was set aside. Mr. Robertson read to us passages in the judgment of Sir Arnold White at page 74. This case is of use only in so far as all the other cases discussed above are referred to and discussed by the Chief Justice. In this case again no question

(1) (1890) 17 Cal. 642.

(2) (1901) 25 Mad. 61.

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ever arose about the Court's power to go into questions of law other than those reserved or certified, or of excluding evidence which appeared on the record.

In addition to the cases cited by the learned Counsel for the accused I have gone through the notes of a judgment delivered by a Full Bench of this Court on the 17th of April 1903. In this case *Emperor* v. *Leherchund and others* (1), the principal point complained of and in respect of which the Advocate General's certificate was obtained was the improper admission of evidence which was let in as admissible under section 10 of the Evidence Act. Having decided that the evidence in respect of which the Advocate General had certified *was* improperly admitted the Court says:—"For the Court to deal with the case *de novo* no doubt transfers from the jury to the Court the determination of the question whether the *legal evidence* in the case is sufficient to support a conviction." A careful study of the notes of judgment leaves no doubt whatever in my mind that the words "legal evidence" are used only to distinguish the evidence that remained after excluding the evidence *illegally* admitted in respect of which there was a certificate from the Advocate General. That this is so appears from the latter part of the notes where, after discussing the remaining evidence, it is stated: "We have come to this conclusion solely on the evidence with which we have dealt and excluding the evidence of several accomplices, the statements of Nemchand and all relating to the alleged accomplices." In this case also there never was a question raised for the exclusion of any evidence in addition to that which the Advocate General had certified to have been wrongly admitted.

In discussing all these cases I have specially picked out of them everything I can find that is most favourable to the contentions put forward on behalf of the accused and then anxiously considered the same. I can find nothing in them to justify our following the course so strenuously fought for by Mr. Robertson.

To sum up shortly my views of this question, I hold that the question of the admissibility or otherwise of the accused's

(1) Unreported.

confession (Exhibit B) was a question which the learned Judge who presided at the trial had to decide. After hearing arguments of counsel he pronounced his judgment on the question and admitted it in evidence. The accused's counsel did not ask for a reservation of this point for the opinion of the High Court. The acting Advocate-General refers only to one exhibit and leaves the confession untouched. Under the circumstances I am of opinion that it is not open to us at this stage to go into the recorded evidence for the purpose of finding whether the confession was properly admitted. It is on the record. It is before us as part of the evidence against the accused. I hold that we have no power to exclude it altogether from our consideration.

Although before now I was aware of the views of my learned colleagues who have preceded me in delivering their judgments on this point I had no opportunity of considering the reasons which are now given by my learned colleagues Messrs. Justice Chandavarkar and Batty. I have followed them with great attention, more especially the very elaborate reasoning of Mr. Justice Chandavarkar. I regret to say I am still unconvinced and it is a matter of great regret to me that I am not in accord with three of my colleagues on the Bench. It is, however, a source of satisfaction to me to know that at least one of my colleagues is in entire accord with the view I have taken of this question.

This finding of mine necessitates the consideration of the questions whether the confession of the accused so far as it relates to his own guilt is true or false? What is the weight to be attached to it? And is it by itself or coupled with the other evidence in the case sufficient to support the conviction?

Before, however, discussing these questions it would be as well to say here that having heard arguments fully on both sides and perused the evidence if I had to pronounce an opinion on the question as to whether the confession was properly admitted I would say that in my view of the evidence the confession was rightly admitted in evidence by the learned Judge at the trial. I am of opinion that the confession was not obtained either by threat, inducement, or promise of any kind.

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The question to be now considered is: Having excluded the piece of evidence covered by the certificate of the acting Advocate-General is there sufficient evidence before us to support the conviction? In my opinion there is.

It is clearly established by the evidence that a registered article numbered 477 came from Ahmedabad to Bombay on the 9th of December 1905. It disappeared and has never been found again. A registered article bearing number 277 purporting to come from Colaba was delivered to one Sitaram Kamat at Banda in the Sáwantvádi District. The article was a bottle of ringworm powder which would not ordinarily be sent by registered post. It is proved that no parcel bearing No. 227 came from Colaba. The witness Dwarkanath, who has been for fifteen years in the Post Office, was entrusted with the investigation of this matter and he has given evidence after what appears to me to have been a very exhaustive and laborious inquiry. He sums up the result of his labour as follows:—

"I say 477 was received on the 9th of December. 277 was despatched from the General Post Office on the 9th December. I have examined the total number of receipts of articles sent out to *all parts of the world* on the 9th December and the total number of articles despatched. I found the number did not tally. I found so many received and so many despatched. The receipt and despatch of all letters tallies. *227 took the place of 477.*" (See printed book, p. 30.)

The Post Office authorities made inquiries as to Registered parcel bearing No. 227 of Sitaram Kamat the addressee. He declined to give any information as to the sender. He said he was unable to furnish particulars of the sender's name and address. This was in April 1906. This statement of his appears to me to be manifestly untrue and lends force to the other evidence in the case that the accused and his friends had put pressure on this man to withhold all information from the Post Office. Now about this time a fellow clerk of the accused named Karandikar was being prosecuted by the Post Office authorities in the Police Court on the charge of stealing this very packet No. 477. Sitaram Kamat, the recipient of the Parcel numbered

227, was subpœnaed to give evidence in that case. It was easy for him to have pleaded forgetfulness when questioned by a Post Office official. It would not be so easy for him when giving evidence on oath to pretend that he could not give the name and address of the sender of a Registered parcel received by him only four months before the date when he was called upon to give evidence. The accused knew this. He knew that an innocent man was being prosecuted for this offence. At the next hearing of the case against Karandikar which I believe was on the day following the day on which he confessed, the Banda man Sitaram would be examined and then facts would transpire which would point to him as the real culprit. In Exhibit B his confession made before Mr. Hooper, the Presidency Post Master, he says:—

"I heard yesterday that the addressee had been summoned by the Police to give evidence in Court in the case now proceeding against Mr. P. W. Karandikar and fearing that the truth would leak out I confessed the whole matter to my brother K. R. Patki who thought it best to bring me before you to make a full statement of the case."

In this passage the accused gives, to my mind, a correct version of the circumstances under which he first went to Mr. Chattarsingh and subsequently to Mr. Hooper.

It is argued before us that the confession is false and was made under threats used by Mr. Chattarsingh and under promises held by him and that it was obtained by him for the purpose of ruining one Bezonji with whom Mr. Chattarsingh had been on hostile terms. In the view I have taken it is not open to me to go into question of threats, inducements, or promises, but it is open to this Court to find out whether the confession is true or false so far as it relates to the accused's own guilt and to consider what weight should be attached to it.

In the confession made before Mr. Hooper on the 13th of April 1906 the accused makes a clear admission of his own guilt and tries to implicate a superior officer named Bezonji. The confession may or may not be false as regards Bezonji. On the evidence I am of opinion that it is false as regards Bezonji's

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complicity. The motive in doing this is not far to seek. It is the usual practice of criminals, when they find that they could not conceal their own guilt and are driven to make a confession in the hope of getting off lightly, to try and inculpate some body else in order to minimise their own guilt. It seems to me to be the same here. He says he stole the letter—opened it at home—found Rs. 80 in it—brought the whole of this money to Bezonji who asked him to retain Rs. 30 for himself out of it. He goes on to say that he refused to accept the same but Bezonji compelled him to take this sum under threats. From this I have no doubt in my mind that the accused while driven to make a confession was making desparate attempt to appear the victim of somebody else's instigation and to show that he did not steal the letter with a view to take the contents for himself.

Then again look at the circumstances surrounding the making of the confession. The accused when he goes to make his confession is accompanied by his elder brother Krishnaji and his cousin Anant. They tell Mr. Chattarsingh what they had come to him for and he takes them to Mr. Hooper. The making of the confession was not the result of a rash impulse or sudden threat leaving no time for consideration. This step seems clearly to have been decided upon after consideration and consultation with his relations and friends and it is to my mind utterly inconceivable that if the confession was false that those relations who were advising the accused and were present when he made the incriminating statement in the first instance to Chattarsingh would ever have allowed the accused to make those statements. Krishnaji and Anant were present when the accused made his statement to Chattarsingh. Krishnaji was present when Mr. Hooper took down the accused's statement. As I said it is hardly possible to conceive that under the circumstances the accused would make a false statement incriminating himself.

The conclusion I have come to is that the confession so far as it relates to the accused's own guilt is true. It is an important piece of evidence. Coupled with the other evidence in the case I find that the accused is guilty of the offence with which he is charged. I would like here to record my appreciation of the very careful analysis of the evidence presented to us by

Mr. Wadia for the Crown and I feel indebted to both counsel for the Crown and the accused for the very able manner in which they have assisted the Court in putting before us the case each from his own point of view.

The learned acting Chief Justice on a reconsideration of the whole case is inclined to reduce the sentence which he pronounced on the accused. We have the power to alter the sentence and in *Leherchund's* case we have precedent where, while affirming the conviction, the Court reduced the sentence.

I agree with my learned colleagues that having regard to all the circumstances of the case a sentence of three years's rigorous imprisonment would be adequate punishment to the accused.

BEAMAN, J.—Exhibit N, a written statement made by witness Shankar to Policeman Narayenrao, has been certified by the Advocate General to have been wrongly admitted. On this point this Full Bench appears to be agreed, that the writing was, at any rate, wrongly used. But from much that has fallen from my learned collegues I feel some doubt whether our agreement is as complete as it seems upon what is really of the first importance, namely, the true scope and intention of section 162 of the Criminal Procedure Code.

There is an obvious difference in the first place between the improper admission, and the improper use after admission of any piece of evidence I understand that the first question raised by the Advocate General's certificate is whether the impugned evidence was wrongly admitted and I gather from some passages in the judgments which have been delivered by my learned colleagues that while the use of the writing itself as substantive evidence against the accused was clearly and certainly wrong, it is by no means so clear in the opinion of some of them, that the statement, that is to say, the contents of the writing, might not have been quite properly used, if proved, sentence by sentence by the policeman who recorded it, against the prisoner.

And I take it that that view rests upon a distinction between the "writing" and the "statement" which is embodied in the writing.

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With all respect and deference to my learned and honourable colleagues I think that that distinction is a distinction of form rather than of substance. If the "statement" might properly be admitted and used to contradict the prosecution witness who made it, as under the general rule of evidence it undoubtedly could, then I see no reason in principle why that statement should not be provable in the usual way and by the best evidence of it, namely, the written record of it. True, in the body of the section, the use of the writing as evidence, is expressly prohibited—while in the proviso "such statement" is permitted to be used for a limited purpose. The important point is not however the distinction between the "statement" and "writing" (though of course there is a distinction) but the extremely restricted use to which even the statement may, under the section, in contradistinction to the general law, be put. The section plainly constitutes an exception to the ordinary rule of evidence. The proviso again engrafts an exception upon the exception. And in giving effect to the section and the proviso together it is necessary to keep carefully in sight what the Legislature really means. About this the language and the policy of the section, combined, leave, I think, no reasonable doubt. Before the last amendment, statements made by witnesses to the Police, and recorded by the Police might not be used as evidence against the accused. But there was nothing to prevent them being used in favour of the accused. They were often so valuable for that purpose, that in almost every case, the accused sought to know what they contained, with the object of using them if suitable, to his own advantage. In order to curtail to some extent that liberty, the section was amended in its present form. The effect of the amendment is to restrict the privilege of the accused. He can now only obtain access to written statements made by prosecution witnesses to the police, at the discretion of the Court. It is no longer a matter of right.

The proviso is clearly limited to the purpose of this single concession, in derogation of the universal prohibition contained in the body of the section, to the accused. This is so plain on the face of the section and proviso, that I should have thought there could have been no doubt about it. The proviso deals with

one case and one case only, the case of witnesses "called for the prosecution" whose statements have been taken down "in writing as aforesaid." And the only concession it makes to the accused is to allow him, upon his request, and subject to the Court's discretion, to have access to a "copy thereof," namely, of the recorded statemet, and thereupon to use it for one purpose and one purpose only, namely, to break down the evidence of the prosecution witness already standing against him. On the face of it the proviso does not cover the case of a witness for the defence, whose statement may have been recorded by a police-man, nor allows the prosecution to impeach the credit of such a witness by a examining him upon any written statements he may have made to the police. *A fortiori* the proviso could never have been intended (and I think that its terms are plain enough to the contrary) to allow the prosecution to impeach the credit of its own witnesses for its own purposes, and against the wish of the accused, by reference to police testimony. That view presents, on the face of it, these two startling difficulties. (1) That the Legislature has in this important matter given the prosecution a marked advantage over the accused. And this is opposed to the first principles of our criminal jurisprudence. (2) That in effect it works out to this, that the prosecution would be empowered indirectly and under the pretence of shaking the credit of its own witnesses, to substitute in the record, as evidence against the accused person, not what those witnesses have said on oath at the trial but what they have said or may have said in circumstances altogether unknown and uncontrolled, to its own police officers. That is in fact what has happened in this case, and underlies, as I understand, the Advocate General's certified objection to Shankar's statement to Narayenrao. I think it too plain to need further argument that if the prosecution is precluded from using these statements to impeach the credit of witnesses for the defence, it is for much better reasons precluded from using them to impeach the credit of its own witnesses. Nor indeed is that in any case the real object, though it may be plausibly advanced as the nominal object which the prosecution has in view, when it seeks this indulgence. For *ex hypothesi*, when a Crown witness has said nothing

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against the accused no question of impeaching his credit properly arises. The only person interested in shaking the credit of a witness is the person against whom he has said something. What has really happened is this. A witness, who has said things to the police, which the prosecution strongly relies on, refuses at the trial to repeat those things. The prosecution, pretending to wish to impeach his credit, then tries to bring on the record through the police officer, all that matter upon which it intended to rely, not of course to contradict the witness, but as substantive evidence. It wants in other words to substitute for what the witness has said at the trial, what it believes he ought to have said. Apart then from the use to which Exhibit N was put on this occasion I go further, I think, than any of my learned colleagues and say that it ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting Shankar.

While then I agree in the main on this point with my brother Chandavarkar the whole of whose ably reasoned and most instructive judgment commands my admiration, I have not shrunk from pursuing my reasons to their logical conclusion not withstanding that conclusion and those reasons need not perhaps have been thus amplified for the narrow question first to be answered. As to the writing itself being inadmissible, and as to its having been wrongly admitted and treated as evidence, there can of course be no room for doubt or difficulty. On the second point, while I have not for a moment been blind to the difficulty of separating precisely what is, from what is not, a point of law in questions about the admissibility of evidence, I have never entertained any serious doubt that for practical purposes, as well as upon sound principle, I should wish to stand upon the firm and simple grounds admirably and convincingly stated in the judgment of my brother Davar. It is of course extremely easy to embroider that or any other principle with subtle distinctions; but I feel that there ought to be a clear rule of practice, easy to understand and plain to follow. I do not think I can add anything with advantage to what has been said by Mr. Justice Davar on this head. I think that where the

Advocate General has certified a particular piece or pieces of evidence to have been wrongly admitted, the Court of Reference constituted under clause 26 of the Charter has first to determine whether or not the certificate is well founded, and if it decides that it is, then to deal with what remains of the evidence, after striking out what has thus been adjudged not to be evidence. I do not feel much difficulty over the objections raised upon certain phrases in the cases, where the learned Judges say that after having disposed of questions affecting the admissibility of challenged and certified pieces of evidence in favour of the party objecting, the Court must proceed to deal with the rest of the "legal" or "admissible" evidence. My brother Davar has deal with this sufficiently and I entirely agree with him. I think, too, the short answer to another class of objections turning upon the power of the Court of Reference to decide all over again whether any and every word of the evidence is "legal," that is to say, has been rightly admitted and is relevant is this. Presumably it has been objected to by the party applying for the certificate or it has not. If it has, and the Advocate General has refused to certify that in his opinion it was wrongly admitted, then there are two opinions, his and that of the trying Judge in favour of the admissibility of the evidence. And I apprehend that that is and was intended to be enough. If the party did not object, did not ask for a certificate in respect to evidence which is thus challenged for the first time after the trial, at the hearing before the Court of Reference, the objection comes too late. I should also wish to acknowledge the force of my brother Chandavarkar's reasoning upon this point, and the salutariness and prudence of his conclusion. The point is important in itself, and had this direct bearing on the decision of the case that had it been, as I was all along of opinion that it was not, open to us to decide for ourselves whether the confessions ought to have been admitted, I doubted, looking to all the reasons and considerations most ably and exhaustively advanced by Mr. Robertson for the prisoner, whether section 24 of the Evidence Act might not have shut them out. Towards the close of the argument, however, I gathered that all my learned colleagues believed that the confessions had been

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voluntarily made. I should not have pressed the contrary opinion, in those circumstances, had I after fully weighing all that was to be said on both sides been inclined for my own part towards that opinion. I feel that I ought, speaking for myself, to express my great indebtedness to the learned counsel on both sides. To the length the Court wished him to go Mr. Wadia stated the prosecution case with remarkable clearness and mastery of all its complex details, and had my opinion been more generally shared, and had it therefore been considered desirable to hear a more elaborate refutation of Mr. Robertson's argument against the admissibility of the confessions, it is quite possible that the prosecution had materials which in the able hands of the counsel representing the Crown would have completely dispelled my doubt. On the other side no single point that could and ought to have been pressed for the accused was omitted by Mr. Robertson whose powerful arguments greatly impressed me. I agree with my learned colleagues in the order proposed.

[*Statement of witness excluded from evidence: conviction approved: sentence reduced to three years' rigorous imprisonment.*]

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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June 29.

GANGABAI (PLAINTIFF) *v.* PURSHOTUM ATMARAM (DEFENDANT).*

Easement—Ancient Lights—Injunction to restrain defendant from interfering with ancient lights—Quia timet *action, necessary ingredients for.*

There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial.

Fletcher v. *Bealey*(1) followed.

* Original Suit No. 783 of 1906.

(1) (1885) 28 Ch. D. 688.