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HEATON, J.:—I have no doubt in my own mind that the particular premises with which we are now dealing comprise the existing building and the plot on which that building stands. The lessee (in this case the applicant) is the person who receives the rent of those premises. The lessor takes the ground-rent which is something quite different from the rent of the premises. As the lessee takes the rent of the premises, he is the owner within the meaning of that word as used in section 305, as will appear from the definition of the word "owner" given in clause (*m*) of section 3 of the Bombay City Municipal Act III of 1888. As the lessee is the owner in this sense, I think that the notice mentioned in section 305 was correctly addressed to him, and that the Magistrate's order is right.

Rule discharged.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* AKBAR BADOO.*

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Criminal Procedure Code (Act V of 1898), sections 162, 288—Indian Evidence Act (I of 1872), sections 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions' Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.

During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was

* Criminal Appeal No. 145 of 1910.

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examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—

Held, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial.

(2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused.

The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial.

APPEAL from conviction and sentence recorded by R. E. A. Elliott, Additional Sessions Judge of Ahmedabad.

The accused Akbar Badoo and Anwar Abashi were charged with the offences of house-breaking and theft. They were tried by the Additional Sessions Judge of Ahmedabad with the aid of Assessors.

The charge was that the accused broke open the house of the complainant during his absence, and committed theft of some gold and silver ornaments belonging to the complainant.

In the course of the Police investigation that followed, one Chhagan Asharam admitted that he had sold some gold for the accused Akbar. And after some time, Chhagan admitted, in the presence of the Panch, that the accused Akbar had given to him some ornaments to sell.

Akbar Anwar and Chhagan were then arrested, when Anwar admitted before the Police that Akbar had given him some ornaments to sell, which he had sold to one Ismail. Ismail was arrested next.

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All these persons were the next day sent to a Magistrate who recorded their confessions.

The charges against Akbar and Anwar were retained: and in the inquiry before the Committing Magistrate, Chhagan was examined as a witness.

The accused were committed to the Sessions Court to take their trial. In convicting them, the Sessions Judge gave the following reasons:—

All four ivory bangles were ornamented with gold and the gold has been stripped off them. Accused 1 sold the gold through Chhagan whose evidence in this Court that he sold the gold and Chudi on behalf of two brahmins Umiashankar and Nanalal has been contradicted by the Sub-Inspector, the Panch witnesses, Muljibhai Zaverbhai (Exhibit 23) and Muljibhai Naranbhai (Exhibit 24) and by the question put by accused 1 to the Sub-Inspector in cross-examination.

These facts leave no room in the minds of the Court or Assessors that Chhagan Asharam has lied in this Court and that as stated in his confession and in the lower Court he got these articles from accused 1. Ismail (Exhibit 12) admits he got 8 Vintls 2 gen 2 machlis and 4 silver studs; Lalla produced one ivory bracelet (Exhibit G) and its pair (Exhibit M) was found in the house of Jina Jibhai who has absconded.

Now we have it admitted by accused 2 that he lent his plough-share which makes a very formidable jemmy to accused 1 and that soon after accused 1 gave him the things to sell which he sold to Ismail. There is no doubt that his statement is exculpatory, but taken with the evidence of Chhagan Asharam to the Police on the 19th, to the Honorary Third Class Magistrate on the 20th December 1909 and to the First Class Magistrate, Kaira, on the 13th January 1910 there can be no doubt accused 1 is guilty and accused 2 practically admits it.

The accused appealed to the High Court.

There was no appearance on behalf of the accused.

The Government Pleader appeared for the Crown.

HEATON, J.:—In this case two accused persons, Akbar Badoo and Anwar Abashi, were tried for house-breaking and theft by the Sessions Judge at Nadiad and both were convicted. Akbar has appealed and with his appeal we have to deal.

The Sessions Judge has admitted and considered, against the appellant, a good deal which is not evidence at all.

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Statements made by the witness Chhagan to the Police implicating the appellant have been admitted and used.

The same witness Chhagan's statement to the Panch and his statement as an accused person made before a Magistrate were admitted and used.

They were inadmissible for reasons I will explain later.

Then statements made by the co-accused Anwar to the Police were admitted and used. They were altogether inadmissible as evidence of the appellant's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the appellant. (See section 21 of the Evidence Act.)

Then there is the statement of a witness Ismail that the accused Anwar told him that he got certain things from the appellant. That statement was inadmissible against the appellant.

What remains of this part of the case after stripping it of irrelevant matter is this: Chhagan's statement to the Committing Magistrate is admissible in evidence (Criminal Procedure Code, section 288). In it Chhagan stated that certain articles were given him by appellant Akbar Badoo. Chhagan in the Sessions Court gave quite a different account of how he came by them and the Judge disbelieved that account and believed what was stated to the Committing Magistrate. But he used Chhagan's statement to the Police and his statement as an accused person and his statement to the Panch, by way of corroboration of what Chhagan had stated to the Committing Magistrate. In this he was entirely wrong. Only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act. Previous statements may be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. The Judge did right to see the statement of Chhagan recorded by the Police if it was reduced to writing (see section 162, Criminal Procedure Code). I also think he would have been right to look at the statement made by Chhagan as an accused person, because the appellant was

undefended and consequently there was no pleader on his behalf to whom these statements could be shown. But the object of referring to such statements should have been to see whether they contained anything which could be used for the purpose of cross-examining, on behalf of the accused, the witnesses examined for the prosecution. These statements, in this case, could not be used to corroborate what Chhagan said in the Sessions Court, for they were useless for that purpose. Therefore, they should not have been admitted.

The net result, had the Law of Evidence been properly regarded, would have been this: There was Chhagan's statement to the Committing Magistrate which implicated the appellant. The Sessions Judge who heard the statement made by Chhagan in his own Court exculpating the appellant did not believe it and he found nothing favourable to the accused in the materials which could be used on his behalf, for the purpose of cross-examination.

In effect this is perhaps what the Sessions Judge really intended; but he actually adopted the illegal course of bringing irrelevant statements on to the record and using them against a prisoner under trial.

The Investigating Police Officer's deposition contains a great deal which no investigating police officer ought, in my opinion, to be allowed to depose to in examination-in-chief. I refer to the Police Officer's account of what various persons besides Chhagan said to him. It may be that what the witnesses said is admissible by way of corroboration within the terms of section 157 of the Indian Evidence Act, but to allow the Investigating Police Officer to be questioned about them in examination-in-chief, opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial. The evidence against him, in so far as it consists of the statements of witnesses, is intended to be primarily the

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statements made to the trying Court, and secondarily, in a case tried by a Court of Session, the statements made to the Committing Magistrate.

Lastly, the Judge has used against the appellant the statement made by the co-accused in the Sessions Court. That statement is not a confession. Of course the Judge was bound to hear and record what the co-accused said but it ought to have had very little, if any, effect in determining, in the mind of the Judge, whether the appellant was or was not guilty. So little is it worth, in this case, that it was really superfluous to mention it amongst the circumstances which go to establish the appellant's guilt.

There has not been a proper trial of the appellant. He has been convicted largely on the strength of statements many of which ought never to have been heard or used, and, in my opinion, we are bound to reverse the conviction and acquit the appellant.

Conviction reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1910. *March* 1.

JAINABAI AND ANOTHER, PLAINTIFFS, *v.* R. D. SETHNA AND OTHERS, DEFENDANTS.*

Mahomedan law—Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders.

In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.

* Original Suit No. 792 of 1909.