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CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Shah.

EMPEROR v. MALLANGOWDA bin PARWATGOWDA.*

*Indian Evidence Act (I of 1872), section 26—Confession—Custody of Police—
Confession made to doctor in dispensary while Policemen are waiting outside
is bad.*

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The accused, an undertrial prisoner, was sent up by the Magistrate in whose lock up he was, in the custody of two policemen, to a hospital for treatment. The policemen made him over to the doctor and waited in the verandah to take him back. While with the doctor in his room, the accused made a confession of his guilt. At the trial, the confession was allowed to be proved. A question having arisen whether the confession was properly let in :

Held, that the confession was excluded by section 26 of the Indian Evidence Act. (I of 1872), because the accused who was in police custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah.

Queen-Empress v. Lakshmya bin Bhima⁽¹⁾, followed.

THESE were appeals from convictions and sentences passed by V. M. Ferrers, Sessions Judge of Dharwar.

The two accused persons were tried for the offence of the murder of one Bhimawa. Accused No. 1, Mallangowda, was kept as an undertrial prisoner in the lock-up of the Magistrate. He was suffering from a venereal

* Criminal Confirmation Case No. 17 of 1917, Criminal Appeals Nos. 237 and 238 of 1917.

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disease. The Magistrate sent him for medical treatment to the local hospital in the custody of two policemen. The policemen left him with the doctor, inside the dispensary and waited outside on the verandah to take him back to the lock-up. While the accused was with the doctor, he confessed to having committed the offence, in the presence of another patient who happened to be there.

At the trial, the above confession was allowed to be proved by the depositions of the doctor and the patient. The learned Judge acted upon the confession, convicted both accused and sentenced them to be hanged.

The accused appealed.

Velinkar, with *H. B. Gumaste*, for accused No. 1:— The so-called confession is inadmissible under section 26 of the Indian Evidence Act (I of 1872). The words “police officer” in the section mean any police officer; they are not restricted to the police officer investigating the case. The accused when he made the confession to the doctor was in the custody of the two policemen who brought him from the lock-up and were waiting on the verandah to take him back to the lock-up: see *Empress v. Lester*⁽¹⁾ and *Queen-Empress v. Lakshmya bin Bhima*.⁽²⁾ The case of *Queen-Empress v. Tatyia*⁽³⁾ is distinguishable for the accused there was in the custody of the jailor and the confession was made to him.

S. S. Patkar, Government Pleader, for the Crown:— The words “police officer” in section 26 of the Indian Evidence Act (I of 1872) mean the police officer investigating the case: see sections 160, 161 and 162 of the Criminal Procedure Code (Act V of 1898); see also *Queen-Empress v. Tatyia*⁽³⁾.

⁽¹⁾ (1895) 20 Bom. 165.

⁽²⁾ (1896) Ratanlal's Cri. Cas. 855.

⁽³⁾ (1895) 20 Bom. 795.

BATCHELOR, J.:—The first question that arises in these appeals is whether a certain extra-judicial confession said to have been made by the 1st accused to one Kumarappain in the presence of the Sub-Assistant Surgeon in the dispensary is admissible in evidence or should be excluded under section 26 of the Indian Evidence Act. The learned Sessions Judge tells us that he was at first disposed to exclude the evidence, but on further consideration decided to admit it. I am of opinion that the learned Judge's first impressions were correct and that he erred in admitting the confession upon his record.

The facts are that while this accused was in the lock-up of the Magistrate under trial, he was sent by that Magistrate to the dispensary in order to be treated for a malady which involved an examination of the patient in private. Two policemen took the accused from the lock-up to the dispensary. At the dispensary the policemen waited outside on the verandah while the accused was inside undergoing examination at the hands of the doctor. The policemen were waiting there in order to retake the accused when he emerged from the dispensary and to conduct him back to the Magistrate's lock-up, and the confession was made during the few minutes when the accused was inside the dispensary and the two policemen were waiting outside on the verandah for his return. The question is whether the confession is excluded by section 26. Now that section provides, so far as we are at present concerned with it, that no confession made by any person while he is in the custody of a police officer shall be proved as against such person. It is clear that we cannot read into the section limitations and restrictions for which the language of the Legislature affords no countenance. In the first place I have no doubt that if the accused No. 1 was in police custody up to the arrival at the hospital, he

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remained in that custody while the policemen were standing outside on the verandah. If authority is wanted for the view that no breach of the custody would be occasioned by the temporary separation of the accused from the police in these circumstances, it may be found in this Court's decision in *Queen-Empress v. Lakshmya bin Bhima*⁽¹⁾. The question then is whether the accused No. 1 was in the custody of the police from the time that he left the Magistrate's lock-up. I myself cannot doubt it. It is no answer to say that he was in the general custody of the Magistrate. The actual physical custodians or guards of this accused No. 1 at the material time were those two policemen. They were there for no other purpose than to guard him or prevent his escape, and it seems to me impossible to say that he was not in their custody. The section requires only that the custodians should be police officers and that these men were, nor were they less police officers, because they may be regarded as acting as agents of the Magistrate. The word "police officers" in section 26 is apparently used in the same sense in which it occurs in section 25, and I can see no reason for importing into section 26 the notion that the "police officers" there described in general terms must be restricted to the investigating police. The case relied upon by the learned Sessions Judge (*Queen-Empress v. Tatyia*⁽²⁾), it seems to me, has no direct bearing upon the question we have before us. For that case decided only that a confession was properly admissible which was made to a jailor not being a police officer who had the custody of the confessing accused.

On these grounds I am of opinion that the confession alleged to have been made by the first accused is not admissible in evidence, and it is unnecessary to consider the other case referred to in argument

⁽¹⁾ (1896) Ratanlal's Cri. Cas. 855.

⁽²⁾ (1895) 20 Bom. 795.

(*Empress v. Lester*⁽¹⁾) or to discuss the question whether the point arising in that case was or was not rightly decided.

Apart from the confession which is now excluded, we think that there is no evidence upon this record which could sustain the conviction of the 1st accused.

[His Lordship here discussed the evidence, and reversed the conviction and sentence passed on accused No. 1, but confirmed the conviction of accused No. 2 and reduced the sentence passed on him to one of transportation for life.]

SHAH, J.:—I am of the same opinion.

Order accordingly.

R. R.

(1) (1895) 20 Bom. 165.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Beaman.

KHEMRAJ SHRIKRISHNADAS (RESPONDENT-PLAINTIFF) APPLICANT *v.*
KISANLALA SURAJMAL MINOR NOW STYLING HIMSELF AS RAMA-
NOVAS GANGAVISHNU BY HIS GUARDIAN SURAJMAL JOHARMAL
(APPELLANT-DEFENDANT) OPPONENT.*

Security for costs—Appeal in forma pauperis—Civil Procedure Code (Act V of 1908), Order XLI Rule 10, not applicable to pauper appeals—Security should not be demanded.

The plaintiff having obtained a decree in the lower Court, the defendant appealed and applied for leave to appeal in *forma pauperis*. The application was granted. The defendant-appellant, however, resided out of British India and was not possessed of sufficient immoveable property in British India.

* Civil Application No. 103 of 1917.

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