ORIGINAL CRIMINAL.

Before Mr. Justice Fawcett.

1921. December 21.

KING EMPEROR *v.* HAJI SHER MAHOMED AND OTHERS (ACCUSED)*.

Penal Code (Act XLV of 1860), section 400—Evidence Act (I of 1872), section 14—Previous conviction of theft—Whether admissible for proving that the accused has associated with a gang for the purpose of habitually committing dacoity—Practice.

Where an accused person is charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity under section 400 of the Indian Penal Code, evidence showing that he has been previously convicted on a charge of theft, or has been ordered to give security for good behaviour is not admissible under section 14 of the Indian Evidence Act.

The Public Prosecutor v. *Bonigiri Pottigadu*(1), *Emperor* v. *Debendra Prosad*(2) and *Emperor* v. *Panchu Das*(3), referred to.

THE facts of the case so far as they are necessary for the purposes of the report are sufficiently stated in the judgment.

S. G. Velinkar with *Haji* instructed by the Public prosecutor, for the Crown.

R. S. Pandit, for accused Nos. 4, 22, 23, 24.

FAWCETT, J.:—There are twenty-four accused persons before the Court charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity under section 400, Indian Penal Code. It is sought to prove against one or more of these accused that they have been previously convicted for the offence of theft, or have been ordered to give security for good behaviour on the ground of being habitual thieves, &c., under Chapter VIII of the Criminal Procedure Code. The question is whether

*Fifth Criminal Sessions of 1921; Case No. 4.

(1) (1908) 32 Mad. 179. (2) (1909) 36 Cal. 573 at p. 584.

(3) (1920) 47 Cal. 671 at pp. 692-696.

evidence of such previous convictions or orders is admissible against them under section 14 of the Indian Evidence Act. There is no doubt (1) that, in the case of a person accused under section 400, Indian Penal Code, a previous conviction of dacoity is admissible under section 14, as held in *Empress* v. *Naba Kumar Patnaik*[1] and (2) that a previous conviction of theft or an order to give security on the ground of being an habitual thief, is admissible against him in a case where he is charged under section 401, Indian Penal Code, i.e., belonging to a gang of persons associated for the purpose of habitually committing theft or robbery, held in *Bhona* v. *Emperor*[2] and *Emperor* v. *Tukaram Mâlhari*[3]. In these two cases such evidence clearly falls under section 14 of the Indian Evidence Act, as showing a disposition on the part of the accused towards the particular conduct alleged against him in the charge, namely a habit of committing (1) dacoity and (2) theft. But if in order to establish a habit of committing dacoity you rely on evidence that the accused had previously committed thefts, you no doubt produce evidence which may show a disposition towards conduct *of a similar description* to that in question, but not *of the exact description* in issue. Dacoity is equivalent to (a) theft+(b) more offenders than four+(c) violence, and elements (b) and (c) are wanting. A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity. It is little, if anything, more than evidence of bad character which is excluded by section 54 of the Indian Evidence Act. This lays down the general rule that ordinarily the fact that the accused person has a bad character is irrelevant, and it is only if the

(1) (1897) 1 C. W. N. 146 at p. 150. (2) (1911) 38 Cal. 408.

(3) (1912) 14 Bom. L. R. 373 at p. 375.

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evidence now sought to be put in falls under section 14 that it escapes this general rule. Explanation I to section 14 lays down that a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question, and illustrations (*o*) and (*p*) to the section illustrate what is meant thereby. If in illustration (*p*) the word "did" is substituted for the word "said" I think it clearly shows that the evidence in question is irrelevant. It will then run as follows :—

"A is tried for a crime:

The fact that he did something indicating an intention to commit that particular crime, is relevant.

The fact that he did something indicating a general disposition to commit crimes of that class, is irrelevant".

(It may be noted that there is a mistake in repeating this illustration in Ameer Ali's Evidence Act, which has persisted even to the last Edition, namely, the word "relevant" is wrongly given in the last clause instead of the word "irrelevant.)"

In a case like the present the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, and simple theft or bad livelihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not, I think, evidence indicating an intention to commit the particular crime of which the accused is charged. It at most merely indicates a disposition to commit crimes of a similar class, though I think it is very doubtful whether dacoity must not be put in a higher class than theft, so that the evidence would not even fall within the description

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mentioned in the last clause of illustration (*p*). Therefore, I think that section 14 does not permit of this evidence being admitted. The authorities also support this view. In *The Public Prosecutor* v. *Bonigiri Pottigadu*[1] it was held that in a case under section 400, Indian Penal Code, the evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Indian Evidence Act. The remarks in *Emperor* v. *Debendra Prosad*[2] and in *Emperor* v. *Panchu Das*[3] support the view I have taken. In the last-named case even the dissenting Judge, Chaudhuri J., at page 709 says:

"No doubt, evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to them".

I hold, therefore, that the proposed evidence is inadmissible except in the case where the accused himself has given evidence that he has a good character, in which case it is admissible under section 54.

G. G. N.

(1) (1908) 32 Mad. 179. (2) (1909) 36 Cal. 573 at p. 584.
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Evidence Act (I of 1872), section 25—Statement by accused during police inquiry regarding property produced by him—Whether admissible if self-exculpatory but involving an admission of an incriminating circumstance—Penal Code (Act XLV of 1860), section 400—Practice.

* Fifth Criminal Sessions of 1921 : Case No. 4.