APPELLATE CRIMINAL.

Before Mr. Justice Pratt and Mr. Justice Fawcett.

EMPEROR *v.* MARUTI JOTI SHINDE*.

1921.
June 7.

Criminal Procedure Code (Act V of 1898), section 288—Statement made as witness before Committing Magistrate—Retracted before Sessions Court—Earlier statement may be taken as evidence in the case—Indian Evidence Act (I of 1872), section 155.

In the course of an investigation by the Police and thereafter when examined as witnesses before the Committing Magistrate two boys stated that they saw the accused committing the offence under inquiry. At the trial before the Court of Session, however, they gave an entirely different version of the affair.

Held, that though the effect of section 155 of the Evidence Act was to make their previous statements to the Police and to the Committing Magistrate relevant only to contradict their present evidence, the statements before the Magistrate could, where considered necessary, be used as substantive evidence of the facts therein deposed to under section 288 of the Criminal Procedure Code.

Queen-Empress v. *Dorasami Ayyar*(1) and *Emperor* v. *Dwarka Kurmi*(2), followed.

Queen-Empress v. *Jadub Das*(3), referred to.

THIS was an appeal from conviction and sentence passed by E. H. P. Jolly, Assistant Sessions Judge at Satara.

The accused were charged with the offence of causing mischief by fire to a shed punishable under section 436 of the Indian Penal Code.

The prosecution case was that the accused wanted the complainant against his will to sell his land to them. On the complainant's refusing to do so, they threatened to damage his property. Shortly, afterwards, the complainant's cattle-shed which was in his field was burnt down by fire.

* Criminal Appeal No. 151 of 1921.

(1) (1901) 24 Mad. 414. (2) (1906) 28 All. 683.

(3) (1899) 27 Cal. 295.

1921.

EMPEROR v. MARUTI.

There was circumstantial evidence to connect the accused with the crime. There was also direct evidence of two boys Joti and Shankar.

These boys stated before the Police that they were sleeping in the shed on the night it took fire. They were awakened by the accused who asked them to untie the bullocks and remove them. They did so. The accused next set the shed on fire. In the inquiry before the Committing Magistrate, the boys adhered to their version. But when they were examined as prosecution witnesses at the trial, they set up a different story. They stated that on the night in question they had tied up the cattle in the shed as usual and fed them. Then they went to sleep. They were awakened by the noise of the falling tiles and found that the hut was on fire.

The previous statements made by the boys were brought on the record of the case. The learned Judge used these statements only to contradict the statements made at the trial, on the following grounds :—

"I do not think it is open to me to take into consideration these previous statements made to the Police and Committing Magistrate for any other purpose than to negative their present statements that they have no knowledge of how the fire was caused ; it is not open to me to treat these statements as if they were evidence given by the witnesses in this Court."

The trial ended in conviction of the accused. Each of the accused was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 100.

The accused appealed to the High Court.

K. N. Koyajee, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

Per CURIAM :—The two accused have been convicted of the offence under section 436, Indian Penal Code, in that they destroyed by fire on the night of 14th May

1920 the cattle-shed of the complainant in the village of Chikli.

It is admitted that the cattle-shed was burnt down hat night. The next day the complainant's brother Dadu made a statement to the effect that the fire was ccidental and a Panchnama was recorded to that effect. The Panch and the Patil state that Dadu said that the two accused had burnt down the shed and that he was afraid to complain against them as they were the leaders of a gang who were the terror of the village.

The story given by the complainant and his brother Dadu is that these two accused endeavoured to extort from them a sale-deed of a field and on his refusal threatened that very night to burn down his cattle-shed. Shortly after that, the complainant was informed by the two Mahar boys Joti and Shankar that the cattle-shed had been burnt down in their presence by the two accused.

Now there is no doubt that the fire was not accidental. This is proved by the items of circumstantial evidence to which the Sessions Judge has referred. Firstly, the complainant and his brother did not invoke the assistance of any of the villagers to put out the fire. Secondly, the fact that none of the cattle in the shed were injured corroborates the story of the two boys Joti and Shankar that the two accused had come to them in the cattle-shed and set fire to it after directing them to untie the bullocks tethered there. Thirdly, the fact that the explanation of the fire given in the Panchnama cannot be true for there was no hemp on the upper floor of the cattle-shed.

Again there is no doubt that a state of terrorism existed in the village. The complainant and his brother left the village two days after the fire and did not return

1921.

EMPEROR v. MARUTI.

till sent for by the police some months later. Also an armed police post was stationed in the village to deal with this gang. These facts make it very probable that the explanation given of the statement of Dadu and the Panchnama of the 15th May are true.

Then there is the evidence of Narayan, Dadu and Vithu, that accused attempted to extort the sale-deed from Narayan, and on his refusal threatened to burn down his shed. And there is the direct evidence of the two Mahar boys, Joti and Shankar, that it was the accused who set fire to the cattle-shed.

The statements made by Joti and Shankar are substantive evidence in the case. The Sessions Judge is wrong when he considers their previous statements made to the Police and the Committing Magistrate are relevant only to contradict or negative their statements made in the Court of Session. That is the effect of section 155 of the Indian Evidence Act; but section 288, Criminal Procedure Code, goes further and makes such statements "evidence in the case", i.e., substantive evidence of the facts therein deposed to. We agree on this point in the interpretation put upon the section in the cases of *Emperor* v. *Dwarka Kurmi*[1] and *Queen-Empress* v. *Dorasami Ayyar*[2]. In the latter case the judges said:—

"There can be no doubt the provision was intended to enable the Court to read the previous evidence as substantive evidence in the case at the where, for the purposes of justice, the adoption of such a course is found necessary by the Judge"

Before such evidence is substituted under section 288, Criminal Procedure Code, it is necessary, as pointed out in *Queen-Empress* v. *Jadub Das*[3], that there should be some reason why it should be preferred.

[1] (1906) 28 All. 683. [2] (1901) 24 Mad. 414 at p. 416.
[3] (1899) 27 Cal. 295.

1921.

EMPEROR v. MARUTI.

That is a matter of prudence and not of law. Considering the state of terrorism which existed in the village and the probabilities of the case we feel sure that the statements of these two witnesses in the Magistrate's Court was the truth.

We accordingly confirm the conviction and sentence and dismiss the appeals.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

June 7.

NILKANTH DEVRAO NADKERNY AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* RAMKRISHNA VITHAL BHAT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS[°].

Civil Procedure Code (Act V of 1908), section 92—Hereditary Muktesars—Suit for a declaration that co-trustees not properly appointed—Suit not within the scope of section 92.

The plaintiffs as the hereditary Muktesars (trustees) of a temple sued for a declaration that the defendants Nos. 1 to 4 were not properly appointed trustees of the temple and for an injunction restraining them from interfering with the plaintiffs in the management of the affairs of the temple. A question being raised whether the suit fell within the provisions of section 92 of the Civil Procedure Code, 1908,

Held, that the suit was outside the scope of that section as the plaintiffs were not suing on account of any breach of trust as contemplated by it, nor were they applying for any direction of the Court for the administration of trust.

Subramania Pillai v. *Krishnaswamy Somayajiar*[1], discussed and dissented from.

[°] Second Appeal No. 269 of 1920.

[1] (1919) 42 Mad. 668.