

imperatrix Vs. Pitamber Jina

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Court : Mumbai

Decided On : Jul-07-1877

Reported in : (1878)ILR2Bom61

Judge : Michael Westropp, C.J. ;Charles Sargent and ;Atkinson, JJ.

Appellant : imperatrix

Respondent : Pitamber Jina

Judgement :

Michael Westropp, C.J.

1. We are unanimously of opinion that the question which Mr. Inverarity proposed to put to the cart-driver Bala Ramji, in cross examination; was, under the circumstances, admissible. On hearing the arguments, we have come to the conclusion that Section 25 of the Indian Evidence Act (I of 1872) does not preclude the counsel for one accused person on behalf of his client, asking questions to prove a confession made by another accused person. But under such circumstances it would be the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence to be considered on behalf of the other. We also think that, unless the law were so, the accused person who was on his trial with the confessing party, might be considerably prejudiced by the exclusion of that evidence. The 25th section only provides that 'no confession made to a police

officer shall be proved as against a person accused of any offence.' In this case the confession was sought to be proved not as against either the confessing person, or his co-accused, but on behalf of the latter. There is not anything, of which we are aware, in the Indian Evidence Act, to which Act alone (sec. 2) we are at liberty to look for the law of evidence in this country, that would justify us in excluding such evidence when sought to be given on behalf of the co-accused, provided it be relevant. It may be said that it is a matter of difficulty for a jury to give to the latter accused the benefit of such evidence, and not to permit it to prejudice in their minds the confessing party. But the Court is not to presume that the jury will disobey the direction of the Judge (whose duty it is to instruct the jury as to the law), when he tells them, as he should do, that the confession made to a police officer is not to be regarded as evidence against the accused who made it. That accused would have the protection of the direction, whereas, if the confession were wholly excluded, the co-accused might suffer serious injury and would be absolutely helpless. The value of the confession, as a circumstance in his favour, may be great or small. That is a matter to be weighed by the jury. When a judge, on perusing the depositions before trial, perceives that such a confession, by one accused, is likely to be offered in evidence on behalf of another accused, it would be an important matter for his consideration whether it would not be desirable to direct that the accused persons should be separately tried.

2. Inverarity then submitted that the question now ruled admissible, having been rejected by the learned Judge who presided at the trial, the conviction must be quashed, as the Full Court had no power to go into the evidence for the purpose of seeing whether the event of the trial had or had not been affected by the rejection of the question. Section 167 of Act I of 1872 refers to the Court originally trying the case, and the expression 'the Court' in that section, in a case tried by a jury, means the judge and the jury. In such a case it is the judge and the jury who have to decide whether the result would have been different had the rejected evidence been received; but the jury who tried this case having been discharged after returning their verdict, it is impossible now to obtain the decision of 'the Court who tried the case' on the question whether the result of the trial would have been different if the rejected evidence had been admitted, and it is not competent for the Full Court to go into the merits and pass a decision now. There has been a

difference of opinion on this point in both the High Courts of Bombay and Calcutta: Regina v. Navroji 9 Bom. H.C. Rep. 358, Regina v. Humble I.L.R. 1 Cal, 207.

Michael Westropp, C.J.

3. We are of opinion that we now have, as was ruled by the majority of the Court in each of the two cases cited by the learned Counsel for the prisoner, power to review the whole case, and determine for ourselves whether, if the rejected question had been admitted, the result ought still to have been the same. Apart from those two cases, i.e., if the question were now raised for the first time, we think that, by Clause 26 of the Letters Patent 1865, and Section 101 of the High Court's Criminal Procedure Act (X of 1875) the power of so reviewing the whole case, on a point of law such as the admissibility of rejected evidence when reserved, is expressly conferred on this Court. We are clearly of opinion that Section 167 of the Indian Evidence Act 1872, is applicable to criminal as well as to civil cases, and is so to criminal cases, whether or not the trial has been had before a jury, and that the expression in that section 'the Court before which such objection is raised,' includes the reviewing of Appellate Court. That the 167th section applies to criminal as well as to Civil Courts is, we think, satisfactorily established by the 1st section, which renders the Act applicable 'to all judicial proceedings in or before any Court, including Courts Martial,' with certain exceptions not material in this case; and by the 3rd section, which declares that the word 'Court' includes all judges and magistrates.

4. Inverarity then went into the merits of the case, with the view of showing that, had the first prisoner's confession been before the jury, they would not have returned a verdict of guilty against the second prisoner.

Michael Westropp, C.J.

5. The question which Mr. Inverarity, as counsel for the second prisoner, proposed to put, and which we have ruled might have been admitted, was 'whether the policeman did not ask the first prisoner in the bullock cart a question, and did not the first prisoner reply' I have killed a man on the Vellard, and the other has run away? 'The learned Judge, if he had admitted this evidence, would have been

bound to tell the jury that it was not evidence against the first prisoner; but we are of opinion that he should have directed the jury to take the evidence into consideration as regarded the second prisoner. That, however, would, we think, in this instance, have left the case in precisely the same condition. Suppose the first prisoner did say 'I killed the man,' still he said nothing expressly exonerating the second prisoner. The jury came to the conclusion that the prisoners had acted in concert in the murder of the deceased. The rejected evidence might have proved that the blow was actually struck by the first prisoner, but it did not affect the question whether the second prisoner was acting in concert with him, and the conviction and sentence should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial. The admission of this evidence could not properly have varied the result in any respect. Under these circumstances we must allow the conviction to stand, it being in our opinion perfectly consistent with all the evidence which bears on the second prisoner.