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Court : Mumbai

Decided On : Mar-21-1920

Reported in : (1920)22BOMLR1247

Judge : Heaton, Kt., Acting C.J.,; Shah and ;Hayward, JJ.

Appeal No. : Criminal Confirmation Case No. 4 of 1920

Appellant : Emperor

Respondent : Cunna

Judgement :

Shah, J.

1. It will be convenient to give a brief statement of the facts relating to this case. The accused Cunna and the deceased Dev Naik went together from Halgeri to Byadgi. The purpose of the trip was to well the betelnuts belonging to the deceased Dev Naik. They returned from Byadgi to Halgeri on the morning of the 4th of January 1918. The deceased had with him nearly Rs. 400, being the proceeds of the sale of his betelnuts; and this fact was known to the accused. The deceased went in the afternoon of that day to Husur, an adjoining village, and returned in the evening back to the house of Cunna. The deceased left the house of the accused during the night for his native place Hukli, and on the way from Halgeri to Hukli he was murdered on the night of the 4th-5th of January 1918. The

news of his death was received on Sunday the 6th of January. His body was found with a number of wounds, but the money was not found. A report was sent by the Police Patil. But that report was sent back for an entirely unsatisfactory reason. A second report was sent on the 7th, and the Sub-Inspector Malhar Bhatt arrived on the 7th. Thereafter the accused was arrested and he was sent up in due course to the Magistrate to have his confession recorded. The accused reached the Magistrate whose camp was at Sampkhand and made a confession on the 11th of January 1918. In this confession he implicated three persons, Narsappa, Abdul Ajij. and Faridbad, as being concerned in this murder, and briefly speaking he admitted that he was present, and saw the actual commission of the crime by these three persons. This confession is very long and full of details describing fully the first meeting of the deceased and the accused at Halgeri, the trip to Byadgi, the business done at Byadgi, the return journey from Byadgi to Halgeri, his movements at Halgeri on the 4th January, his journey from Halgeri at night towards Hukli, and the details connected with the occurrence of the murder of Dev Naik. Then, on the 1st of February 1918, the Committing Magistrate, to whom the case was sent up against the three persons named by him and the present accused, tendered a pardon to him under Section 337 of the Criminal Procedure Code; and he was specifically warned that the essential condition of the tender of the pardon was that he was to make a true and full disclosure of the whole of the circumstances within his knowledge relating to the murder of Dev Naik and that if he failed to fulfil that condition he would forfeit the pardon, that he would be liable to be tried on the charge of murder, and that his statement could be used in evidence against him. He accepted the pardon: and lie was then examined by the Committing Magistrate on the 1st and 2nd of February 1918. He substantially repeated the story told by him in his confession in the same detailed manner. Ultimately at the trial of Narsappa, Abdul Ajij and Faridsab, on the charge of murder of Dev Naik, he repeated the same statement in March 1918. This statement also is detailed and substantially a repetition (if the story told by him in the first confession. The result of the trial, however, was that the three accused who were then charged with the murder of Dev Naik were acquitted and the learned Sessions Judge suggested that the proper authorities should investigate into the conduct of the investigating Sub-Inspector Malhar Bhatt and various

matters connected with the investigation. At the end of the trial apparently the present accused was allowed to go. There is no mention made in the judgment as to the opinion formed by the Judge about the effect of his view of the ease on the pardon tendered to Cunna.

2. Subsequently there was an investigation by a Sub-Inspector belonging to the C. I. D. apparently against Malhar Bhatt. There is no evidence in this case as to the details of this investigation, nor is there anything to show as to when exactly it was definitely realised by the Crown that the story told by Cunna at the murder trial was positively false. We find that proceedings were initiated against Malhar Bhait in the beginning of the year 1919. In January J919 the present accused was examined as a witness in the case before the Committing Magistrate when in effect he stated that the murder was committed by him and two others whose names he was not prepared to mention, and he gave detailed account as to how he was induced by Malhar Bhatt to put forward the detailed story which he had put forward in his confession and how Malhar Bhatt had promised to see him safe with reference to the charge of murder. He also narrated that he had given Rs. 850 as a bribe to Alalhar Bhatt in consideration of the favour which he had undertaken to show to the accused. Malhar Bhatt was in fact charged with giving and fabricating false evidence, with falsifying official records with a view to save Cunna from legal punishment, with receiving bribes from the accused Cunna and his father, and with extorting money from Bira, the brother of the deceased Dev Naik. Malhar Bhatt was committed to the Court of Session and at his trial the present accused made another statement in May 1919 in which he substantially adhered to the story which he had stated before the Committing Magistrate in that case. Malhar Bhatt was convicted of all the charges. The learned Judge observed at the end of his judgment that it would be obvious to all concerned that Cunna had not fulfilled the condition upon which his pardon depended.

3. Thereafter apparently proceedings were taken against the present accused on the charge of murder in December 1919, and as a result of those proceedings he was tried by the Sessions Judge of Kanara with the aid of Assessors, The Assessors were divided in opinion. One was of opinion that the accused was guilty: the other was of opinion that he was not guilty. The learned Sessions Judge

came to the conclusion that the charge against the accused was established and sentenced him to death subject to continuation by this Court. We have considered the appeal preferred by accused as also the question of the continuation of sentence.

4. There can be no doubt in the case that Dev Naik was murdered on the night of the 4th-5th January 1918. He was last seen before he left Halgeri for his native village of Hukli on the evening of the 4th by the wife of the present accused at her place, and subsequently was found dead with a number of wounds on his person without the money, which he had with him. The medical evidence also indicates that in all probability there were more persons than one concerned in this crime. The evidence in the case, apart from the statements of the accused, with which i shall presently deal, is meager as to the identity of the murderer. That evidence is sufficient to suggest a suspicion against the accused. But apart from his (statements the evidence in my opinion is wholly insufficient to establish the guilt of the accused. That is the view taken by the Sessions Judge, and with that view 1 agree. There is nothing definite against the accused in his immediate conduct after he was seen by the Police until when the information of the death of Dev Naik was received and after the Sub-Inspector arrived on the scum:. In the present proceeding he has denied his guilt; and his having pointed out the two pieces of a scythe is not of any real importance to connect him with the crime in view of the disclosures as to the production of property and the stain of human blood on the scythe and the pen-knife in the proceedings against Alalhar Bhatt. The witness Kare Naik has been examined to prove an oral confession made to that witness. The Judge has refused to levy upon that evidence and in my opinion rightly. The evidence of the witness Ganesh is not sufficient to establish any confession on the part of the accused, and if the other statements of the accused are not admissible, it is difficult to see how the evidence of Ganesh could be relied upon to establish any confession on the part of the accused.

5. The question of the admissibility and the weight to be attached to the various statements which the accused has made is very important in this case, because the conviction could be sustained, if at all, provided those statements are found to be admissible in evidence arid reliable so far as they relate to his inculpation in this

crime, I shall first deal with the confession made by the accused on the 11th of January 19t8. That was a confession recorded by the First Class Magistrate under Section 164 of the Criminal Procedure Code. The subsequent disclosures clearly establish the fact that that was a statement made by the accused when he was entirely under the influence of the then investigating Sub-Inspector, who undoubtedly had offered him inducement to make it; and that is enough to make the confession irrelevant under the provisions of Section 24 of the Indian Evidence Act. I do not desire to elaborate this point because that view was not contested by the learned Government Pleader.

6. The next two statements in point of time are the statements which he made before the Committing Magistrate and t he Sessions Court in the murder case against the three innocent persons. At that time he was examined as a witness because a pardon was tendered to him under the Code of Criminal Procedure; and it is clear to my mind that under Section 839 the accused by wilfully concealing essential information and making false statements with regard to those persons who were then under trial, did render himself liable to be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he might have been guilty in connection with the same matter. These statements which are made in the proceeding in which the accused was examined on oath as a witness in virtue of the pardon tendered to him may be given in evidence against him under Section (2), when the pardon has been forfeited.

7. I just pause here to deal with the point as to whether the pardon is forfeited. The accused has not relied upon the pardon at this trial; and it seems to me clear in view of the statements which he subsequently made in Malhar Bhatt's case that he failed to fulfil the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relating to this murder and to every person concerned whether as principal or abettor in the commission thereof. Therefore these statements may be given in evidence against him.

8. It is urged, however, on behalf of the accused, that the provision in Section 339 (2) does not entirely abrogate or supersede Section 24 of the Indian Evidence Act so far as these statements are concerned, and that the express provision is

intended to make it clear that the tender of pardon would not make them inadmissible. It is argued that if it can be shown in a particular case that apart from the inducement of the legal pardon, the witness has given his evidence under such other influence as would invite the application of Section 24 of the Indian Evidence Act the particular statement which would amount to a confession on his part would be irrelevant. On the other hand, it is urged for the Grown that Section 339, Sub-section (2) of the Criminal Procedure Code practically supersedes Section 24 of the Indian Evidence Act when once a pardon is tendered to a person and accepted by him and that person has given evidence as a witness under the benefit of that pardon. This is by no means an easy point; and after a careful consideration of the arguments urged on both sides, I have come to the conclusion that though the statements made by an approver may be given in evidence against him under Sub-secton (2) of Section 339 of the Criminal Procedure Code, it cannot be said that the operation of Section 24 of the Indian Evidence Act, is altogether excluded. Ordinarily the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of Section 24 of the Indian Evidence Act, I do not think that the confessional part of the statements which can be given in evidence against the accused under Section 339, Sub-section (2) of the Criminal Procedure Code can be treated as relevant in spite of the provisions of Section 24 of the Indian Evidence Act.

9. In briefly stating the reasons for this conclusion at the outset I desire to deal with the arguments urged by the learned Government Pleader with reference to the limitation of Section 24 of the Indian Evidence Act. It was first suggested that the statements made on oath even though of an incriminating nature is not a confession contemplated by Section 24 of the Indian Evidence Act. In my opinion the provisions of Section 24 are general and are intended to exclude confessions which have been improperly obtained. The word 'confession' means an admission of a criminating circumstance, which suggests the inference that the person making the statement committed the crime. The observations in Queen-Empress v. Nana I.L.R. (1889) Bom. 269. and Imperatrix v. Pandharinath I.L.R (1881) Bom.

34 show that any statement made by a person which would suggest an inference as to his guilt may be a confession within the meaning of Section 24 of the Indian Evidence Act. In the present case the confessional part of these two statements is clear. The accused admits therein his presence at the murder, but not any active participation in the commission of the crime. That is clearly a confession.

10. The second general consideration urged by the learned Government Pleader is that Section 24 applies only to the case of an accused person, who is charged as an accused person at the time when he makes his confession, and in support of this argument he has relied upon the observation of Mr. Justice Maclean in The Empress v. Nobin Chundra Banikya I.L.R (1882) Cal. 560, and certain remarks in Emperor v. Mahamctdbulesh : (1906)8BOMLR507 . In my opinion however, Section 24 would apply even if the person said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. In fact in the argument that the person accused was not an accused person at the time when he gave his evidence as a witness to whom a pardon is legally tendered, were a sufficient answer to the application of Section 24, it might almost establish that the provision in Sub-section (2) of Section 39 of the Criminal Procedure Code would be superfluous. The object and scope of Section 24, in my opinion, clearly indicate that it would not be right to read such a limitation as the argument urged by the Government Pleader in my opinion involves. The section does not refer in terms to any particular time when the confession in order to be within the scope of the section must be made. It is quite enough that the confession is subject to the infirmities which are laid down in that section, and if it is made by an accused person either at a time when he was an accused person, or before he came to be accused, or even at the time when he was under the benefit of the pardon, in my opinion it could not be said that Section 24 on that ground would not apply. The observation in Emperor v. Mahamadbuksh (1906) 8 Bom. L. R. 612 must be read with reference to the context, and I do not think that the point was decided in that case in the sense in which the learned Government Pleader has contended before us.

11. The question really is whether the application of Section 24 of the Indian Evidence Act is completely excluded in the case of statements, to which the provisions of Section 33 of (2), Criminal Procedure Code, apply. I do not think so. Section 839 (2) simply provides that when the legal pardon is forfeited the statement may be given in evidence against him, which in substance means that in virtue of the tender of pardon, which the person concerned has subsequently forfeited under the section, he will not be protected from the effect of having made the statement on oath when he was under the benefit of that pardon. But there is nothing either in the terms or the reason of the rule to indicate that Section 24 cannot apply to a confession contained in the statement, even though the facts necessary to invite its application are established. If it can be shown in any case that the person making the statement was at the time under inducement other than and in addition to the inducement of a legal pardon, I do not see any reason why Section 24 should not apply. No doubt very strong and clear evidence of the operation of such other influence would be required. But in law I think it is open to an accused person to establish the existence of such inducement. Thus the question to my mind is whether it is shown on the evidence whether the conditions necessary to invite the application of B. 24 have been fulfilled.

12. Before I proceed to deal with this question 1 desire to say a word with reference to the decision in the case of Emperor v. Fakira Appaya : (1915)17BOMLR1059 . That was a case relating to a statement made by an accused person before the Committing Magistrate with reference to which Section 28 of the Criminal Procedure Code provides that it shall be tendered by the prosecutor and read as evidence. Whether in the case of such a statement there is any real scope for a possible application of Section 24 of the Indian Evidence Act or not is a matter upon which it is not necessary to express any opinion in this case. In Emperor v. Fakira Appaya, my brother Hay ward was of opinion that Section 24 of the Indian Evidence Act would have no application. Mr. Justice Batchtler did not express any decided opinion on the point. It may be, as suggested by the learned-Government Pleader, that the inclination of his opinion was in favour of the vie w that Section 24 could not apply. But the phraseology of Section 287 is different from that of Sub-section (2) of Section 339; and the case has no direct application, in my opinion, to the question that arises in this case with

reference to the statements made by an approver. I am unable to hold, on the strength of the opinion expressed in that case, that Section 24 can have no application to the statements made by a person, who has accepted the tender of pardon, and who has forfeited it. I have already given my reasons for the view which I take as to the possible application of Section 24 in a case in which the necessary facts are established.

13. In the present case the question is whether these two statements which the accused made as a witness in the murder trial are shown to have been improperly induced so as to invite the application of Section 24 of the Indian Evidence Act. I am of opinion that it is shown that they were the result of improper inducement on the part of the investigating Sub-Inspector Malhar Bhatt. In coming to this conclusion I have given full weight to the circumstance that not only according to law, but in view of the explicit manner in which the conditions of the pardon were brought home to the accused, it may be said that the statements could not have been made under any other inducement. In spite of this clear warning of the Magistrate that he was expected to make a true and full disclosure of the facts relating to the murder, he straightway proceeded to make statements which are now shown and admitted to be false. Those statements are exactly in accordance with the previous confession which he had made be lore the Magistrate, and which was recorded under Section 164. It is, in my opinion, difficult to resist the inference that at the time who ii he made his statement on oath the real influence which was operating on his mind was not only the influence of the legal tender of pardon, but also the most objectionable influence of the Sub-Inspector. It is, in my opinion, not right to ignore the facts which are not now in dispute, and which clearly show how the Sub-Inspector was then exercising his influence on the present accused and how he was perverting the cause of truth and justice. Undoubtedly the accused became a party to it, so much so that even at the risk of forfeiting the legal pardon he was prepared to make these false statements. In my opinion the force of that inducement must have been simply irresistible at the time he made those statements before the Committing Magistrate and at the trial. It is on that basis that the series of lies which he has stated on oath on both these occasions can be truly explained. It is clear on the facts not now in dispute, that the confessional parts of these two statements could not be properly treated as having been the result of

the legal pardon merely which was tendered to him to elicit the truth but to a great extent induced by the influence which the Sub-Inspector was then exercising over this accused. I fully recognize that the accused was undoubtedly ready and most objectionably ready to subject himself to this influence, as the Sub-Inspector was ready to exercise it. But even in the case of such a person I do not see how Section 24 can be said to be inapplicable. In my opinion it is not reasonably possible to avoid the inference which I have stated with regard to the application of Section 24 as regards the confessional parts of these two statements.

14. Assuming, however, for the sake of argument that these two statements are admissible under s^ 339, Clause (2) of the Criminal Procedure Code, speaking for myself, 1 am not prepared to attach any weight whatever to these two statements. These statements are substantially repetitions of what was stated in the confession, and there are so many false statements relating to three innocent persona that it is not easy to separate the truth from the falsehood. It is no doubt a strong argument in favour of accepting these statements that a person would not lightly and wrongly inculpate himself. Ordinarily it would be a strong consideration. But having regard to the way in which the truth and the course of justice have been perverted in this case, under the objectionable influence of the then investigating Sub-Inspector, and the extent to which the accused has mixed up falsehood with such truth as there might be in the statements, I would consider it really unsafe to attach any weight to statements made under those circumstances.

15. I now come to the statements which the accused made in the case against Malhar Bhatt. These are to my mind the most important statements, and, if they are admissible in evidence, undoubtedly there is a strong case against the accused. The difficulty, however, with regard to these two statements), which presents itself to my mind is as to the admissibility of the confessional parts thereof. At the time when these two statements were made, the legal position of the present accused was that he was liable to be tried on a charge of murder, and that he was a competent witness in the case against Malhar Bhatt. Ordinarily, if there was nothing else, his statement of an incriminating character made on oath without any objection raised by him as to his obligation to answer the question put to him as a witness, would be admissible. At one time I felt some doubt as to

whether those statements would be admissible in view of the proviso to Section 132 of the Indian Evidence Act. But the learned Government Pleader has shown, in my opinion satisfactorily that in spite of the diversity of judicial opinion on this point it is now a settled rule that unless a person objects to any question the answer to which is likely to criminate him, he cannot be said to have been compelled to give such answer within the meaning of the proviso. This diversity of judicial opinion is sufficiently indicated in Queen-Empress v. Ganu Sonba I.L.R (1888) Bom. 440 and The Queen v. Gopal Doss I.L.R (1881) Mad. 271.: and whatever may be my view as to the proper interpretation of- Section 132 of the Indian Evidence Act, including the proviso, I think that the' position must be accepted that the answers which the witness- has given, though of an 'incriminating character, could be proved against him in the trial to establish the offence to which those incriminating answers relate.

16. The difficulty, however, which remains with reference to these statements arises from the provisions of Section 24 of the Indian Evidence Act. The learned Sessions Judge on this point has taken the view that the facts which would invite the application of Section 24 with reference to these two statements are established, but in his opinion the statements are saved under Section 339, Sub-section (2) of the Criminal Procedure Code, and could be admitted in evidence under that sub-section. In my opinion Sub-section (2) of Section 839 has no application to the statements made by the accused in Malhar Bhatt's case. They were not made by him as a person to whom any pardon was tendered with reference to the charge that was under investigation; and reading Section 839, Clause (2) in relation to the context, it is clear to my mind that these statements could not be admitted in evidence in virtue of the provisions of Section 339, Sub-section (2) of the Code of Criminal Procedure.

17. The question is whether the confessional parts of those statements are irrelevant under Section 24 of the Indian Evidence Act If it appears to the Court that the statements were made as the result of any inducement having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable; for supposing that by making it he would

gain any advantage or' avoid any evil of a temporal nature in reference to the proceedings against him, the confession contained therein would be irrelevant. I am clearly of opinion that Section 24 as a matter of law would apply if the conditions necessary for the application of that section are established and the question is purely one of fact as to whether the confessional part of these statements is shown to have been the result of such inducement as is described in Section 24. The facts relevant in my opinion with reference to this point are that when the murder trial ended in favour of the, three accused who were then charged, the present accused wag allowed to go. There was no observation in the judgment that the pardon was forfeited and according to the facts then known, it was not clear that his pardon was forfeited. Though the accused must have known that he had not fulfilled the conditions essential to retain the benefit of the pardon, lie could not be reasonably expected to believe that his pardon was forfeited. Then nearly for a year there were no proceedings. In the beginning of 1919 proceedings were taken against Malhar Bhatt. No evidence is adduced by the prosecution in the present case relating to the investigation carried on during this interval. It is not shown that anything was done either in the course of the investigation or at the trial of Malhar Bhatt to put this witness in mind of his real position that he had forfeited the pardon, and that at the date he was liable to be tried on a charge of murder. Under the conditions under which the accused came to be examined in Malhar Bhatt's case, it seems to me that the accused then had grounds which would appear to him reasonable for supposing that by adhering to the incriminating statement as regards himself he would gain some advantage or avoid .some evil of a temporal nature in reference to the charge of murder. It seems to me that the learned Judge's conclusion that the impression produced by the pardon had not ceased to operate at the time is right. In my opinion those two statements were made under the influence of the pardon which was in fact tendered, but with regard to the forfeiture whereof nothing had been done or said by any authority up to the time that he came to make those statements. The circumstances were peculiar and on the special facts it is difficult to avoid the inference as to the inducement operating on his mind. To start with there was a very improper inducement ordered by the investigating Sub-Inspector, then there was the tender of a pardon, and after the trial of the case in which he was

examined as an approver, for nearly a year no steps had been taken against him to put him on his trial on the charge of murder. It is, in my opinion, quite natural for a person in that position to believe, though there may be no legal justification for it, that he was safe in adhering to the incriminating statement regarding himself. Thus at the time of these statements, his liability to be tried on the charge of murder was there. His fate depended upon the will of the Grown, i. e., as it would appear to the witness to a certain and appreciable extent upon the will of the then investigating officer. It was open to the Crown not to take any action against him: at least NO it would appear to the person concerned. Under those circumstances the Crown should have definitely made it clear to him that he was going to be prosecuted. In the absence of any such clear indication of his true position in fact, it is difficult to avoid the inference that the accused made his statements under an erroneous but honest belief that he was securing an advantage of a temporal character by adhering to the self-inculpation and by exposing Malhar Bhatt and it is difficult to dissociate this belief from the inducement which must be taken to have operated on his mind in consequence of the apparent silence of the investigating officer in Malhar Bhatt's case as to whether he was going to be tried on the charge of murder or not It is true that there is no direct evidence of such inducement. But the situation that arose was such that unless the impression created thereby was completely removed, its existence must be inferred. This brings me to the argument based on the words of Section 28 of the Indian Evidence Act. I agree that the impression created by Malhar Bhatt was completely removed when the accused saw him in the dock and gave evidences against him. But the impression created by the tender of pardon, apparently not declared forfeited by any responsible authority with no proceedings against him for nearly a year, wan not completely removed. At least it is not shown by the prosecution that it was so removed. Section 28 shows that once an impression of any improper inducement is created, it is necessary to show that it is completely removed to make the statement relevant. The learned Government Pleader has relied upon Section 29 to show that the confession does not become irrelevant merely because lie was not warned that he was not bound to make such a confession and that evidence of it might be given against him. But this argument ignores the effect of the words 'if such a confession is otherwise relevant' and of the expression 'merely because'. In

the present case the confessions contained in the statements appear to me to fall within the scope of Section 24, and are therefore irrelevant: arid the argument for the defence does not seek to make the statements irrelevant merely because the accused was not warned that he was not bound to make such confession and that the evidence of it might be given against him. The argument based on Section 29 affords no sufficient answer to the difficulty which exists in the way of the prosecution in this case in asking the Court to take these statements into consideration against the accused so far as the charge of murder is concerned. It is with regret that I have felt myself constrained to come to this conclusion, because the result of it is that none of the statements made by the accused can be taken fairly into consideration against him in this case. Of whatever atrocious mendacity this accused may have been guilty for which he may be still liable to be prosecuted, I find it difficult to avoid the conclusion that these confessions cannot properly be admitted in evidence against him, and the set of statements which he made at the murder trial, even if admitted in evidence, do not, in my opinion, afford any safe basis for his conviction.

18. The result is that this charge of murder is not established against the accused. I would, therefore, allow the appeal, set aside the 'Conviction and sentence, and order him to be acquitted and discharged.

Hayward, J.

19. The accused Gunna appeals against his conviction of the murder of his uncle Dev Naik on the early morning of Saturday the 5th January 1918 on the high road near the village of Mensi between Halgori and Hukli in the Kanara District. The case comes before us also for confirmation of the sentence of death passed upon him by the Sessions Judge of Kanara under Section 302 of the Indian Penal Code.

20. The accused Cunna lived in the village of Halgeri and his uncle Dev Naik lived about nine miles off at the village of Hukli in the jungles of Kanara. They had proceeded together on a journey of several days to sell betelnuts belonging to the deceased Dev Naik at the town of Byadgi in the Dharwar District. The accused Gunua and his uncle Dev Naik had returned together with certain purchases that

they had made and with the remainder of the Us. 4 /() obtained for the betelnuts in the pocket of Dev Naik. The accused Gunna was the last person known to have been with his uncle Dev Naik when the latter set out alone with the remainder of the Rs. 400 in his pocket upon his return journey in the early morning of Saturday the 5th January 1918 from the accused Guana's house in Halgeri to the deceased Dev Naik's village of Hukli. It was rumored on the morning of Sunday the 6th of January 1918 that Dev Naik had been found dead upon the high road near the village of Mensi between Halgeri and his home at Hukli in the Kanara District.

21. Now the accused Gunna confessed in great detail in the course of the subsequent investigation that he and three others were concerned in causing the death of Dev Naik. It was an exculpatory confession laying the blame mainly upon the three other men. It was recorded on the 11th of January 1918 by the First Glass Magistrate, who was subsequently the Committing Magistrate. It has since been established that this confession had been improperly obtained by the promise of security offered in consideration for his giving up the Rs. 400 that he had obtained by the murder to the investigating Sub-Inspector Malhar Bhatt. It was accordingly held at the trial that the statement was inadmissible in evidence, and rightly so held in my opinion in accordance with the provisions of Section 24 of the Indian Evidence Act.

22. The accused Gunna was, however, offered a pardon on the 1st of February 1918, and the conditions of the offer were specific and were specifically accepted. The question put to him was-Are you willing to accept a tender of pardon on condition of your making a true and full disclosure of the whole of the circumstances within your knowledge relating to the murder of Dev Naik He answered-Yes. I accept tender of pardon and abide by the responsibility. He was then asked--Do you understand that the said tender of pardon will be forfeited if yon wilfully conceal anything essential or give false evidence and that you will be then tried for murder He answered-I understand all this and accept the tender of pardon. He thereafter repeated the story, ho had already told, in all its details on the 1st and 2nd of February and on the 4th of March 1918 before the First Class Magistrate, who was then the Committing Magistrate. He again repeated the statement in full detail on the 15th and 18th of March 1918 before the Sessions

Court. It was then believed to be probably true as regards his own presence at the murder, but to have been wholly unreliable as to the part said to have been taken by the other three men who were then undergoing their trial for the murder of Dev Naik. These other men were accordingly acquitted upon the concurrent finding of both the Assessors and the Sessions Judge.

23. It has been urged before us on his behalf that-these two statements also ought to be excluded as inadmissible by reason of the provisions of Section 24 of the Indian Evidence Act. It has been urged on the other hand that there is a distinction 'between confessions made during investigations referred to in Sections 21 to 30 of the Indian Evidence Act and Section 164 of the Criminal Procedure Code, and statements formally recorded in trials referred to in Sections 209 and 287 of the Criminal Procedure Code. It has been urged that while those made in the course of investigations might well be excluded from the trial, the latter hardly could be. They form in fact themselves a part of the incidents of tile trial and there has been enacted the express legislative provision that they should be read as evidence in Section 287 of the Criminal Procedure Code. It is not, necessary for me to elaborate my opinion upon this point as these are not the kind of statements here in question, and the matter regarding them has been sufficiently dealt with for the present purposes in the case of Emperor v. Fakira Appaya : (1915)17BOMLR1059 But there is this similarity between , them and those here in question, namely statements on oath under promise of pardon that it has similarly been expressly enacted that such statements should, when pardon has been forfeited, be admissible in evidence against the maker under Section 339, Clause (2) of the Criminal Procedure Code. It would, in my opinion, be a straining of language to may that those statements were induced by the previous promise of obtaining a pardon held out by the investigating Sub-Inspector Malhar Bhatt and so inadmissible under Section 24 of the Indian Evidence Act, and that they were not induced by the pardon actually thereafter obtained from the Committing Magistrate. There would, in my opinion, be no doubt whatever that those particular statements if induced by the pardon having been False in respect of the three other men had worked a forfeiture of the pardon, and indeed the defence in the present trial had not endeavoured to rely upon the pardon. The issue was distinctly raised in these words-Do you say that you have been pardoned for the offence

charged against you The answer was--I did not kill the man, and I therefore do not rely on that pardon. It seems to me, therefore, that there can be no doubt that those two statements were rightly admitted in evidence for what they were worth at the trial by the learned Sessions Judge under Section 330, Clause (2) of the Criminal Procedure Code.

24. If these had been the only statements made, it might have been argued with some force that they were not sufficient to bring home the charge to the maker. They had been held to be false in some material particulars. But there were two further statements made subsequently in the course of the proceedings taken for bribery and fabricating false evidence of murder against the investigating Sub-Inspector Malhar Bhatt Ganna admitted in those statements that he was himself guilty of the murder. He admitted that there were other men with him, but he also admitted that they were not the men previously mentioned and tried, and ho declined to give the names of the men who were really his accomplices in the murder. He made these statements on the 27th and 28th January 1919 before the Committing Magistrate and on the 17th and 19th of May J919 at the trial before the Sessions Court.

25. It has again been urged before us that these two statements ought to be excluded from evidence under Section 24 of the Indian Evidence Act. It has been urged that they were made under the inducement 'proceeding from the previous pardon, and that, therefore, they were inadmissible, and that as they were not statements in the course of the trial for murder, they were not within the provisions of Section 339, Clause (2) of the Criminal Procedure Code. It seems to me, however, that the fallacy of this argument lies in the first proposition that they were induced by the pardon within the meaning of Section 24 of the Indian Evidence Act. It is true, no doubt, that he had been offered a pardon, but the terms of that offer were specific and had been specifically accepted, lie then knew that if he made false statements he would forfeit his pardon. He must have known that he had made false statements when he implicated three innocent men at the trial for murder. He must moreover have been perfectly well aware that his statements were known to be false as the three men whom he had accused had been acquitted by the concurrent finding of both the Assessors and the Sessions Judge.

He must have known that the force of the pardon was spent and this haw been shown by the fact that he did not venture to rely upon that pardon at his trial. It seems to me, therefore, that it would be mere sophistry to say that the inducement to make the further statements implicating himself was the forfeited pardon. The inducement was to my mind sufficiently plain. It was his own self interest. He was anxious at all costs to save his own skin, and he thought that there was just the possibility that he might do so by repeating the statements and turning upon his previous protector then in the dock, the investigating Sub-Inspector Malhar Bhatt. This was no doubt the reason which prevented his having recourse to the provisions of Section 132 of the Indian Evidence Act, It has been suggested that he ought to have been warned of his position and that as he was not warned, he ought to be given the benefit of those provisions. But that has been held not to be the law by the concurrent decisions of all the High Courts. It has been held that if a man voluntarily makes an incriminating statement, he must take the consequences for it. He can only plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court. He made no such effort in this case, and he is, therefore, not entitled to the benefit which has been pleaded for him of Section 132 of the Indian Evidence Act. It seems to me, therefore, that these two statements, made voluntarily in the subsequent proceedings for bribery and fabricating false evidence against his previous protector the investigating Sub-Inspector Malhar Bhatt, were admissible and were rightly held to be admissible in evidence against him, and were not barred by the provisions of Section 24 of the Indian Evidence Act. It is unnecessary, therefore, to discuss the further question raised whether they were or were not within the provisions of Section 831), Clause (2), of the Criminal Procedure Code. It seems to me sufficient to say that they have not been shown beyond all doubt to have been within them, and that it would not in my opinion be proper in that particular matter to rely upon the provisions of Section 339, Clause (2) of the Criminal Procedure Code.

26. It seems to me, it' these statements were rightly admitted in evidence, that the guilt of Cunna was hardly disputable upon the merits. The details of his two statements in the original trial were too full and lurid to have been the pure invention of a person who had never been present and had taken no part in the

murder, and they were confirmed as to his presence with the further indication that he must have taken a prominent part in the murder by his subsequent statements in the trial of the investigating Sub-Inspector Malhar Bhatt. It has also to be remembered that he was the last man known to have been with the deceased, that he was the man who knew that there were Ks. 400 in the pocket of Dev Naik, and that he was the man who on his own admission produced in the subsequent investigation the two pieces of broken sickle which, it was stated, had been used for the murder. It seems to me, therefore, that the guilt of Cunna has been fully established and that he has beau rightly convicted of the murder of his uncle Dev Naik on the opinion of one of the Assessors by the learned Sessions Judge. It seems to me further after careful consideration that the sentence passed upon him was the right one. Consideration has been given to the delay. But it has only been too evident that the delay was of his own making for the purpose of saving his own skin and getting three innocent men hanged for the murder. Consideration has been given to the influence exercised upon him by the corrupt Sub-Inspector Malhar Bhatt. But it has only been too evident that he readily fell in with the proposal to obtain security from punishment by the payment of the Rs. 400 obtained by the murder to the grasping Sub-Inspector Malhar Bhatt. Consideration has also been paid to the fact that he was offered a pardon. But it has become only too evident that he forfeited that pardon by malicious perjury, that he knew that he had forfeited it. But that nevertheless with the hope of still saving his own skin he turned against his former protector, then impotent in the dock, the Sub-Inspector Malhar Bhatt. It seems to me impossible in view of his conduct throughout and the , brutality of the murder to record grounds which would be sufficient to justify us in holding that the sentence of death was not properly passed upon him by the learned Sessions Judge. It seems to me, therefore, that we ought to confirm the conviction and the sentence of death passed upon Cunna and that his appeal ought to be dismissed by this Court.

Heaton, Acting C.J.

27. There is no time left for me to state my reasons with any fullness, so that all I will say is that I doubt whether, although I agree with my brother Hay ward, my reasons would altogether correspond with his. I largely disagree with my learned

brother Shah. We are, however, all agreed that the confession made by Cunna in the course of the Police investigation conducted by Malhar Bhatt into the murder cannot be used as evidence. I hold that in the particular circumstances of this case the statements made by Cuuua 'in the murder case when he deposed as a witness are not inadmissible in virtue of Section 24 of the Indian Evidence Act, for they are removed from the operation of that section in virtue of Clause (i') of Section 339 of the Criminal Procedure Code. And I hold in the particular circumstances of this case that the two statements made as a witness by the accused in Malhar Bhatt's case were not caused by any inducement, threat or promise within the meaning of Section 24 of the Indian Evidence Act. 1 will just add a word or two on this point. What the accused himself says about these statements, in so far as he says anything at all, is that they were induced, not by anything that Malhar Bhatt had said, nor by the pardon offered him by the Magistrate, but by what was done by a Criminal Investigation Department Officer in the course of the latter's inquiry. I think to hold that these statements were caused by the inducement offered by the Magistrate when the pardon was tendered is far too conjectural an inference. We do not know what was in the accused's mind. He has not told us himself. The circumstances are so complex and they cover so long a period of time that speaking for myself I feel it quite impossible to say with any degree of certainty what was in his mind, what he hoped to gain, what he hoped to avoid by those statements. But in so far as 1 can conjecture at all, I do not conjecture that he made those statements because of the pardon which had been twelve months earlier offered him by the Magistrate. When once those statements and the two earlier ones are admitted in evidence, the conviction of the accused is inevitable. I find nothing- in this case to excite in my mind any feeling of commiseration. I find nothing that lightens the treacherous wickedness of the man who committed the murder, and I think if there ever can be a case in which the punishment of death is deserved that this is such a case. Therefore I think that not only the conviction but the sentence should be confirmed.

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