[PRIVY COUNCIL.]

IBRAHIM . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

J. C.*

1914

Feb. 9; *March* 6.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Criminal Law—Jurisdiction in China—Afghan enlisted in Indian Regiment—British Subject—China and Corea Order in Council, 1904—*Foreign Jurisdiction Act*, 1890 (53 & 54 *Vict. c.* 37), *ss.* 1, 4, 6, 9.

The appellant, who was a subject of the Ameer of Afghanistan, was enrolled as a private in the 126th Baluchistan Infantry and made an affirmation of allegiance. On September 4, 1912, while he was serving with a detachment of that regiment on Shameen Island at Canton, a native officer of the regiment was murdered; the appellant was taken into custody on the spot and charged with the murder. Under a warrant issued by a judge of His Majesty's Supreme Court for China, he was removed to Hong Kong, where he was tried by the Supreme Court of that Colony and a jury, and upon conviction was sentenced to death. The jurisdiction of the Supreme Court of China and Corea includes criminal jurisdiction and is conferred by the Foreign Jurisdiction Act, 1890, and the China and Corea Order in Council, 1904. Art. V. of that Order provides as follows: "the jurisdiction conferred by this Order extends to the persons and matters following, in so far as by treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say: (1.) British subjects, as herein defined, within the limits of this Order; . . . . (3.) foreigners, in the cases and according to the conditions specified in this Order and not otherwise; (4.) foreigners, with respect to whom any State, King, chief or government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to

* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD SUMNER.

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the exercise of power or authority by His Majesty." Art. III. provides that "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act or otherwise, enjoys His Majesty's protection in China or Corea." Art. L. provides that "where a British subject is accused of an offence the cognizance of which appertains to any Court established under this Order, ... he may be sent for trial to Hong Kong or to Burma."

At the trial uncontradicted evidence was given that the jurisdiction exercised at Canton on Shameen was the same exterritorial jurisdiction as is exercised throughout China and Corea under the Order in Council, that soldiers in Indian regiments enjoy the protection of His Majesty on Shameen, and that the Court exercises jurisdiction over them. The evidence of the officer in command of the detachment was admitted that ten or fifteen minutes after the murder he said to the appellant, who was then in custody, "Why have you done such a senseless act?" to which the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him." There was a body of other evidence which clearly established the guilt of the appellant, and rendered it very improbable that a jury would have acquitted him if his confession had been excluded:—

Held, (1.) that the evidence established that "by usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton, and that the appellant was a British subject within art. III. of the Order; (2.) that the jurisdiction was not prevented from extending to the appellant as a British subject within art. III. by the words "and not otherwise" in art. V. (3.); (3.) that the Court was not precluded from hearing the evidence which established its jurisdiction by reason of the Foreign Jurisdiction Act, 1890, s. 4, which provides for the decision of a Secretary of State upon the application of the Court; (4.) that the appellant's confession was a voluntary statement in the sense that it was not made either from fear of prejudice or hope of advantage, and that, even if it was inadmissible in evidence upon the ground that it was made by him in answer to his officer in whose custody he was (as to which the law was not settled), its admission, having regard to the other evidence given and to the circumstances of the case, was not such a violation of the principles of natural justice as entitled the appellant, according to the practice of the Board, to have his conviction set aside.

The authorities as to the admission in evidence of a statement made by a prisoner in reply to a person in whose custody he is reviewed.

Makin v. *Attorney-General for New South Wales* [1894] A. C. 57 explained.

APPEAL, in forma pauperis by special leave, from a judgment of the Supreme Court of Hong Kong (December 16, 1912) affirming a conviction of the appellant for wilful murder and sentence of death pronounced by the Chief Justice.

The appellant, a natural-born subject of the Ameer of Afghanistan, was enrolled in 1911 as a private in the 126th Baluchistan Infantry, a regiment of His Majesty's Indian forces. After his enrolment the appellant made an affirmation of allegiance to His Majesty and that he would faithfully serve in those forces. On September 4, 1911, he was serving with a detachment of his regiment on Shameen Island at Canton, when Ali Shafa, a subadar or company commander in the regiment, was murdered by being shot with a rifle. The appellant was arrested on the spot and charged with the murder.

A preliminary inquiry took place before the judge of the Provincial Court at Canton, and on September 18, 1912, a judge of the Supreme Court for China and Corea issued a warrant for the removal of the appellant to Hong Kong for trial by the Supreme Court of that Colony. The jurisdiction of the Supreme Court for China and Corea is conferred by the China and Corea Order in Council, 1904, made under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 9. The extent and nature of the jurisdiction appear from arts. III. and V. set out in the head-note. The appellant was sent for trial to Hong Kong under art. L., and the jurisdiction of the Provincial Court at Canton rests upon art. XIX. of the Order.

An indictment was preferred against the appellant by the Attorney-General of Hong Kong charging him with the murder, and he was tried before the Chief Justice and a jury on October 21, 22, 23, and 24, 1912, but the jury failed to agree and was discharged. The appellant was tried a second time before the Chief Justice and a jury on November 18, 19, 20, 21, and 22, 1912, and the jury returned a unanimous verdict of guilty. Sentence was postponed pending the hearing by the Full Court of the Supreme Court of points as to the jurisdiction of the Court raised at the trial. On November 25, 1912, these points were argued before the Full Court (Rees Davies C.J. and Gompertz J.) and judgment was delivered affirming the conviction.

On December 16, 1912, the Full Court dismissed an application for a rule nisi for a habeas corpus and a motion to arrest judgment, and the Chief Justice sentenced the appellant to death.

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The sentence was respited, in the event of leave to appeal being granted, until His Majesty's pleasure should be known. Special leave to appeal in forma pauperis was granted by the Board.

At the trial the Order in Council was put in evidence and the warrant proved; the British Vice-Consul at Canton gave evidence that the place of the murder was within his jurisdiction as judge of the Provincial Court established at Canton under the Order in Council; that the jurisdiction exercised at Canton on Shameen is the same exterritorial jurisdiction as is exercised throughout China by the Supreme Court; that soldiers in Indian regiments enjoy His Majesty's protection in Shameen, and that the Court exercises jurisdiction over them. This evidence was not modified upon cross-examination or contradicted.

The evidence of Major Barrett, the commanding officer of the detachment on Shameen, was admitted at the trial to the effect that within ten or fifteen minutes of the murder, the appellant being then in custody of the guard, he said to the appellant, "Why have you done such a senseless act?" to which the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him."

There was, in addition, a body of evidence, referred to in their Lordships' judgment, as to the circumstances of the murder which clearly established the guilt of the appellant.

Romer Macklin, for the appellant. There was no evidence given at the trial of any "treaty, grant, usage, sufferance or any other lawful means," which could establish the jurisdiction of the Supreme Court of China and Corea under art. V of the Order in Council: *Imperial Japanese Government* v. *Peninsular and Oriental Steam Navigation Co.* (1) The evidence given by the Vice-Consul did not prove that the jurisdiction was exercised by sufferance, it amounted only to an expression of opinion that jurisdiction existed. Further, the jurisdiction having been questioned at the trial, its existence could not be validly proved by the admission of evidence, but only in the manner provided by s. 4 of the Foreign Jurisdiction Act, 1890, namely, by application to a Secretary of State. The appellant is a foreigner

(1) [1895] A. C. 644.

and a subject of the Ameer of Afghanistan. There was no evidence of any agreement with the Ameer, by treaty or otherwise, which would bring the appellant within the category of foreigners to whom the jurisdiction extends under art. V. (4.). The appellant was not a British subject within the definition contained in art. III., but even if he came within the terms of that definition as a person enjoying His Majesty's protection in China, the jurisdiction under the Order in Council did not extend to him, since he was a foreigner, and under art. V. (3.) the jurisdiction extends to foreigners in the cases and according to the conditions specified in the Order "and not otherwise." The Supreme Court held that under the Army Act, 1881 (44 & 45 Vict. c. 58), and the Indian Army Act (Act VIII. of 1911) the appellant was a British subject within the Order. This view is erroneous, since s. 95 of the Army Act, which permits the enlistment of "a person of colour, although an alien," is excluded from application to the Indian forces by s. 180, sub-s. 2 (*h*), of the Army Act, and there is no express provision in the Indian Army Act for the enlistment of aliens. [Army Act, 1881, s. 180, sub-s. 2 (*a*) and (*b*), s. 190, sub-ss. 8 and 22; Indian Army Act, s. 2, sub-ss. 1 and 2; Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), ss. 1, 6, 9, and 11; and *Macleod* v. *Attorney-General of New South Wales* (1) were also referred to.] The evidence with regard to the statement made by the appellant to his officer was wrongly admitted at the trial, since he was in custody at the time and the officer was a person in authority whom he was bound to answer. The Full Court in *Rex* v. *Wong Chiu Kwai* (2) laid down that a statement under these circumstances was inadmissible, and that decision is in accordance with the English authorities. That evidence was of the greatest materiality, and in consequence of its admission the appellant is entitled to have the conviction set aside: *Makin* v. *Attorney-General for New South Wales* (3); Archbold's Criminal Pleading, 1910 ed., p. 190.

Sir R. Finlay, K.C., and *E. W. Hansell*, for the respondent, were not called upon.

(1) [1891] A. C. 455.
(2) (1908) 3 Hong Kong L. R. 89.
(3) [1894] A. C. 57.

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The judgment of their Lordships was delivered by

LORD SUMNER. The appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on January 12, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea. On September 4, 1912, he was a private serving with the detachment of that regiment which was encamped on Sha-mien or Shameen Island at Canton as guard of the Concession. On Shameen are situated the various European settlements including the British. About 10.30 P.M. Subadar Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal, which was brought by special leave in forma pauperis. His grounds are two: first, that the jurisdiction of the Court was not established, and, second, that there was a grave miscarriage of justice by reason of the misreception of evidence.

The jurisdiction of the Supreme Court of China and Corea is conferred by the Foreign Jurisdiction Act, 1890, and by the China and Corea Order in Council, 1904, and includes criminal jurisdiction. Art. V. provides that "the jurisdiction conferred by this Order extends to the persons and matters following, in so far as by treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say: (1.) British subjects, as herein defined, within the limits of this Order . . . .; (3.) foreigners, in the cases and according to the conditions specified in this Order and not otherwise; (4.) foreigners, with respect to whom any State, King, chief or government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty."

By art. VI. it is provided that "all His Majesty's jurisdiction, exercisable in China or Corea for the hearing or determination of criminal or civil matters, ... shall be exercised under and

according to the provisions of this Order in Council and not otherwise."

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exercisable in accordance with the Order in Council, was not shewn to extend, and therefore for the purposes of this case did not extend, to Ibrahim, who is admittedly an Afghan and a subject of the Ameer. Art. III. of the Order defines a "British subject" thus: "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, enjoys His Majesty's protection in China or Corea."

There was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects; but it may be reasonably inferred from the practice of enlisting native Afghans in Indian native regiments, whereby they are de facto brought under the authority of His Majesty, a practice which is matter of public knowledge, that the Ameer does in fact consent to such enlistment with its consequences. Whether or not this suffices to bring such enlisted Afghans within the terms of art. V. (4.) of the Order in Council, "foreigners, with respect to whom any State, King, chief or government whose subjects . . . . they are . . . . consents to the exercise of power or authority by His Majesty,' it is not necessary for their Lordships now to determine.

The British Vice-Consul at Canton, who in September, 1912, was also Acting Consul, is judge of a Provincial Court, held at Canton under art. XIX. of the Order, which is a Court of record, and by art. XXII. exercises "all His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court." He was called as a witness at Ibrahim's trial and deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same exterritorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over

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them"; and that "consular protection extends to trying persons and protecting them if they are improperly arrested." This evidence was not modified under cross-examination or contradicted in any way by evidence for the defence. The witness went on to say that he conducted the preliminary examination in this case and considered it expedient that the case should be sent for trial to Hong Kong (an opinion in which Major Barrett, commanding the detachment, concurred), thus satisfying the provisions of art. L. of the Order with regard to the transfer of the case from Shameen to Hong Kong.

Their Lordships are of opinion that s. 4, sub-s. 1, of the Foreign Jurisdiction Act, 1890, does not prevent this evidence from being admissible upon the question and that, in the absence of contradiction and of any grounds for real doubt, this evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong. It shews that, by "usage, sufferance or other lawful means," His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which Ibrahim belongs; that in the case of Ibrahim himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office de facto, and that they made no objection. Incidentally it disposes of a point taken in argument, that whatever jurisdiction may have been ceded, agreed, or suffered by the Imperial Government of China, it could not be deemed to persist by sufferance or otherwise since recent changes in the constitution and form of government of China took place. Even if such change had been proved, as it was not, or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, this evidence was sufficient to shew that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred. It was suggested that the Vice-Consul was not testifying to the exercise of jurisdiction and sufferance thereof in fact, but was only expressing his opinion that jurisdiction ought to extend to such a case as Ibrahim's, which he said was the first case committed to the Supreme Court from Canton. The judges of the Supreme Court, on the

hearing of the points reserved to the Full Court, did not so take it, neither do their Lordships, and were it not for the gravity and importance of the case they would not think it necessary to pursue this question of jurisdiction further.

Was Ibrahim a British-protected person because "by virtue of the Foreign Jurisdiction Act or otherwise he enjoys His Majesty's protection in China"? The words "or otherwise" must at least include the operation of other statutes, Imperial or Indian, applicable to the person in question, and the various legislative provisions referred to in the elaborate and valuable judgments in the Court below amply establish that, after enrolment and during service in the Indian Army, Ibrahim was a soldier of the Crown and subject to military law while stationed at Shameen. That being so, their Lordships think that it needs no express provision to entitle him to His Majesty's protection. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty, and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. Their Lordships are clearly of opinion that Ibrahim as of right "enjoyed His Majesty's protection" in China, and in virtue thereof was subject also to the jurisdiction of the Supreme Court of China.

Lastly, under this head reliance was placed on the words "and not otherwise" in art. V. (3.) of the Order. These words do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the Order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction, he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British-protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" in art. V. (3.) does not apply.

Their Lordships think it unnecessary further to pursue the

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points argued as to the necessity for proof of the Treaty of Tientsin, 1858; the validity of the proof of the Indian Army Act, 1911 (which, for reasons hereinafter appearing, is so formal a matter as to be immaterial on the present appeal); the conditions under which the Crown may enlist aliens in its Indian forces; and the effect of the preamble and recitals in the China and Corea Order in Council, 1904.

The second ground for this appeal is as follows: Some ten or fifteen minutes after Subadar Ali Shafa was shot Major Barrett, the officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major, "I said, 'Why have you done such a senseless act?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence . . . . ; when I spoke to accused I was sorry for him because he had killed the subadar." This last observation their Lordships treat only as evidence of the way in which the quesiion was put, tending to shew that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It was argued that Ibrahim's statement was inadmissible, (*a*) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (*b*) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner.

On this it becomes incumbent on their Lordships to consider the rule of English criminal law applicable to such circumstances. This somewhat exceptional duty arises because, by art. XXXV. (2.)

of the China and Corea Order in Council, it is provided that "subject to the provisions of this Order criminal jurisdiction under this Order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." There are no provisions in the Order material on this point as modifying or excluding the principles and practice of English law, and their Lordships think that the matter may be justly treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide that such law and practice are in all respects and particulars binding on that Court, nor do they overlook in any way the necessary distinction that must sometimes be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European judges, whose duty it is to have regard alike to the principles of British justice and to the necessities of local order. Nor do their Lordships fail to observe that the words "so far as circumstances admit" may well be applicable to such circumstances in the present case as the facts that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a subadar by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The

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principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg.* v. *Thompson* (1), a case which, it is important to observe, was considered by the trial judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *Reg.* v. *Thompson* (1) before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape,

(1) [1893] 2 Q. B. 12.

when it is to be considered as evidence of guilt, that no credit ought to be given to it": *Rex* v. *Warwickshall.* (1) It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *Reg.* v. *Baldry.* (2) Accordingly, when hope or fear was not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation: *Rex* v. *Thornton* (3); *Rex* v. *Wild* (4); *Reg.* v. *Kerr* (5); and even so late as in *Reg.* v. *Baldry* (2), a case decided on the rule as to hope and fear, Parke B. observes "by the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary, and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . . justice and commonsense have too frequently been sacrificed at the shrine of mercy." The law, however, was considered to be fairly settled: see *Reg.* v. *Cheverton* (6), *Reg.* v. *Reason* (7), *Reg.* v. *Fennell* (8), and the references collected in the note to *Reg.* v. *Brackenbury.* (9) When judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law (e.g.,

(1) (1783) 1 Leach, 263.
(2) (1852) 2 Den. Cr. C. 430, at p. 445.
(3) (1824) 1 Moo. C. C. 27.
(4) (1835) 1 Moo. C. C. 452.
(5) (1837) 8 C. & P. 176.
(6) (1862) 2 F. & F. 833.
(7) (1872) 12 Cox, C. C. 228.
(8) (1880) 7 Q. B. D. 147, at p. 150.
(9) (1893) 17 Cox, C. C. 628.

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Reg. v. *Pettit* (1); *Reg.* v. *Berriman* (2), a case when the accused was not yet in custody).

In 1885 *Reg.* v. *Gavin* (3) reopened these questions. In that case A. L. Smith J. excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross-examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893, Day J. (*Reg.* v. *Brackenbury* (4)) declined to follow this decision, in a case in which the question and answer preceded the arrest, and Cave J. in *Reg.* v. *Male* (5) rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence, though in 1896 (*Reg.* v. *Goddard* (6)) he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins J. (*Reg.* v. *Miller* (7)) allowed the accused's answers to be proved against him, when he had been cross-examined before arrest, saying that he did not expressly dissent from *Reg.* v. *Gavin* (3), but that "every case must be decided according to the whole of its circumstances," but in 1898 (*Reg.* v. *Histed* (8)) he excluded the answers of a prisoner in custody, on the authority of *Reg.* v. *Gavin* (3), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers* v. *Hawken* (9), a case of questions before arrest, a Divisional Court, consisting of Lord Russell C.J. and Mathew J., judges not prone to lean against a prisoner, held that the statement was admissible, and observed that "*Reg.* v. *Male* (5) must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances"; and in *Rex* v. *Best* (10) the Court of Criminal Appeal (including Channell J.) held that "it is quite impossible

(1) (1850) 4 Cox, C. C. 164.
(2) (1854) 6 Cox, C. C. 388.
(3) (1885) 15 Cox, C. C. 656.
(4) 17 Cox, C. C. 628.
(5) (1893) 17 Cox, C. C. 689.
(6) (1896) 60 J. P. 491.
(7) (1895) 18 Cox, C. C. 54.
(8) (1898) 19 Cox, C. C. 16.
(9) (1898) 67 L. J. (Q.B.) 526.
(10) [1909] 1 K. B. 692.

to say that the fact that a question of this kind has been asked invalidates the trial," adding that *Reg.* v. *Gavin* (1) is not a good decision. Here, however, it is to be observed that the actual decision was that under the proviso of s. 4 of the Criminal Appeal Act, 1907, the Court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority. The point has been before the Court of Criminal Appeal more recently. In 1905 (*Rex* v. *Knight and Thayre* (2)) statements were rejected because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. Channell J. adverted thus to the case of questions put by a constable after arresting: " when he has taken any one into custody . . . . he ought not to question the prisoner . . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence." The same learned judge in *Rex* v. *Booth and Jones* (3) in 1910 observes, "the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter"; and of this Darling J., delivering the judgment of the Court of Criminal Appeal, observes the "principle was put very clearly by Channell J."

The learned trial judge in the present case, in addition to the argument of counsel for the defence, had before him a case decided in 1908 by the Full Court at Hong Kong, *Rex* v. *Wong Chiu Kwai* (4), in which the English authorities up to that time were very fully examined. Before admitting the evidence of the

(1) 15 Cox, C. C. 656.
(2) (1905) 20 Cox, C. C. 711.
(3) (1910) 5 Cr. App. Rep. 177, at p. 179.
(4) 3 Hong Kong L. R. 89.

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appellant's statement he consulted Gompertz J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial judge did not follow, the matter is one for the judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal: *Clifford* v. *The King-Emperor*. (1) Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some

(1) (1913) L. R. 40 Ind. Ap. 241.

clear departure from the requirements of justice" exists: *Riel* v. *Reg.* (1); nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done": *Dillet's Case.* (2) It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's Case* (1); *Ex parte Deeming.* (3) The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea.* (4) There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertrand.* (5)

Their Lordships were strongly pressed in argument with the case of *Makin* v. *Attorney-General for New South Wales* (6), in which Lord Herschell L.C. delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically obiter dicta, since the Board held that the evidence complained of at the trial had been rightly admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *Rex* v. *Dyson* (7), though with some later qualification. In *Makin's Case* (6), however, their Lordships had to determine the true construction of s. 423 of the New South Wales Act, 46 Vict. No. 17, which, in defining a strictly appellate jurisdiction in criminal matters, provided "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice." It was held there that to transfer the

(1) (1885) 10 App. Cas. 675.
(2) (1887) 12 App. Cas. 459.
(3) [1892] A. C. 422.
(4) [1893] A. C. 346.
(5) (1867) L. R. 1 P. C. 520.
(6) [1894] A. C. 57.
(7) [1908] 2 K. B. 454.

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decision of the guilt of the accused from a jury, acting on oral testimony, to an appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that a Court of Criminal Appeal is not entitled to dismiss the appeal by retrying the case on shorthand notes, or by holding that, if the trial judge had excluded the evidence which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory Court of criminal review with the functions of the original trial judge and jury. This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's Case* (1), however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury," and this reservation is not to be taken as exhaustive. In England, where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, s. 4, may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict—*Rex* v. *Lucas* (2); *Rex* v. *Stoddart* (3); *Rex* v. *Norton* (4); *Rex* v. *Loates* (5); *Rex* v. *Wilson* (6)—or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance—*Rex* v. *Westacott* (7); *Rex* v. *Mullins* (8)—or most unlikely to have affected the verdict: *Rex* v. *Solomon.* (9) Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction: *Rex* v. *Fisher.* (10) The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute "highly

(1) [1894] A. C. 57.
(2) (1908) 1 Cr. App. Rep. 234.
(3) (1909) 73 J. P. 348.
(4) [1910] 2 K. B. 496, at p. 501.
(5) (1910) 5 Cr. App. Rep. 193.
(6) (1911) 6 Cr. App. Rep. 207.
(7) (1908) 1 Cr. App. Rep. 246.
(8) (1910) 5 Cr. App. Rep. 13.
(9) (1909) 2 Cr. App. Rep. 80.
(10) [1910] 1 K. B. 149.

improbable" for "impossible" in Lord Herschell's reservation above quoted.

Their Lordships think that the jurisdiction which they exercise in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows.

During the hot weather of 1912 the sepoys of the 126th Baluchistan Regiment at Shameen lived and slept a great deal in the open air. The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the avenue. On the night in question the native officers, including Subadar Ali Shafa, were sitting in chairs near the road. Ibrahim and three other sepoys were not far off in a group playing cards. The time was about 10.30 P.M. The subadar went up to them, accused them of gambling, searched them, took away $3.80 of Ibrahim's money, and ordered them to be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the subadar, after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his rifle in the direction of the place where the native officers were sitting. This last significant fact was elicited by the jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, identified by its number. Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in the magazine of his rifle, the bolt of which was open; one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized.

This story, which did not depend at any point on the evidence of one witness only, was amply corroborated in various ways.

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Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing, the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave, or otherwise. They will humbly advise His Majesty that the appeal should be dismissed.

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