Privy Council Appeal No. 112 *of* 1913.

Ibrahim - - - - - - - - *Appellant,*

v.

The King - - - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH MARCH 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
LORD SUMNER.

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 12th, 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 4th, 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

16 e J 305 100 3/1914 E & S

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 is brought by special leave *in formâ 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. Article 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 Article VI. it is provided that "all His "Majesty's jurisdiction, exerciseable in China "or Corea for the hearing or determination of "criminal or civil matters, . . . shall be

" exercised under and according to the pro-
" visions of this Order in Council and not
" otherwise."

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exerciseable in accordance with the Order in Council, was not shown 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.

Article 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 pro-
" tectorate of His Majesty and is for the time
" being in China or Corea, or (*b*) by virtue of
" the Foreign Jurisdiction Act, 1890, or other-
" wise, 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 Article 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, who in September 1912 was also Acting Consul at Canton, is Judge of a Provincial Court, held at Canton under Article XIX. of the Order, which is a Court of Record, and by Article 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 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 Article 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 (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 shows

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 show 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 Article 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 Article V. (3), does not apply.

Their Lordships think it unnecessary further to pursue the 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 10 or 15 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 question was put, tending to show 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 is 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 juris- "diction 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 shown 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 principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *R.* v. *Thompson* (1893, 2 Q.B. 12), 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 *R.* v. *Thompson* 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 tort-feasor, 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 con- "fession forced from the mind by the flattery "of hope or by the torture of fear comes in "so questionable a shape, when it is to be con- "sidered as evidence of guilt, that no credit "ought to be given to it." (Warwickshall's case, 1 Leach 263.) 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. (*R.* v. *Baldry*, 1852, 2 Den. C.C. Res. 430.) Accordingly, when hope or fear were 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 (*R.* v. *Thornton*, 1824, 1 R. & M.C.C.R. 27; *R.* v. *Wilde*, 1835, *ibid* 452; *R.* v. *Kerr*, 1837, 8 C. & P. 176); and even so late as *R.* v. *Baldry* (2 Den. C.C. 430), a case decided on the rule as to hope and fear, Parke B. observes at page 445, "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 R.* v. *Cheverton*, 1848, 2 F. and F. 833; *R.* v. *Reason*, 1872, 12 Cox 228; *R.* v. *Fennell*, 1880, L.R. 7 Q.B.D., at p. 150, and the references collected in the note to *R.* v. *Brackenbury*, 17 Cox 628). 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.*, *R.* v. *Pettit*, 1850, 4 Cox 164; *R.* v. *Berriman*, 1854, 6 Cox 388, a case when the accused was not yet in custody).

In 1885 *R.* v. *Gavin* (15 Cox 656) re-opened these questions. Then 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. (*R.* v. *Brackenbury*, 17 Cox 628) declined to follow this decision, in a case when the question and answer preceded the arrest, and Cave, J. in *R.* v. *Male* (17 Cox 689) 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 (*R.* v. *Goddard*, 60 J.P. 491) he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins, J. (*R.* v. *Miller*, 18 Cox 54) 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 *R.* v. *Gavin*, but that "every case must be decided according " to the whole of its circumstances," but in 1898 (*R.* v. *Histed*, 19 Cox 16) he excluded the answers of a prisoner in custody, on the authority of *R.* v. *Gavin*, 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* (67 L.J., Q B. 526), a case of questions before arrest, a Divisional Court, consisting of Russell, L.C.J., and Mathew, J., judges not prone to lean against a prisoner, held that the statement was admissible and observed that "*R.* v. *Male* 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 *R.* v. *Best* (1909, 1 K.B.D. 692) the Court of Criminal Appeal (including Channell, J.) held that "it " is quite impossible to say that the fact that " a question of this kind has been asked " invalidates the trial," adding that *R.* v. *Gavin* 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 (*R.* v. *Knight and Thayre*, 20 Cox 711) 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 anyone 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 *R* v. *Booth and Jones* (5 Criminal Appeal Reports 179) 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 inad- " missible ; 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, *R.* v. *Wong Chiu Kwai* (Hong Kong Law Rep. iii., 89), in which the English authorities up to that time were very fully examined. Before admitting the evidence of the 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 shown 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*, 40 I A. 241). Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except " where some clear departure from the require- " ments of justice" exists (*Riel* v. *The Queen*, 10 A.C., at p. 675); nor unless "by a disregard " of the forms of legal process, or by some viola- " tion of the principles of natural justice or " otherwise, substantial and grave injustice has " been done" (*Dillet's Case*, 12 A.C., 459). 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, *ubi supra; ex parte Deeming*, 1892, A.C. 422). 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*, 1893, A.C. 346). 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 (*R.* v. *Bertrand*, 16 L.J., N.S. 752).

Their Lordships were strongly pressed in argument with the case of *Makin* v. *A. G. for New South Wales* (1894 A.C., p. 57), 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* (1908, 2 K.B., 454), though with some later qualification. In Makin's case, however, their Lordships had to determine the true construction of s. 423 of the New South Wales Act, 46 Victoria, 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 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, however, reservation was made of cases "where "it is impossible to suppose that the evidence "improperly admitted can have had any in-"fluence 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

ury 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 (*R.* v. *Lucas*, 1 Criminal Appeal Reports, 234; *R.* v. *Stoddart*, 73 J.P., 348; *R.* v. *Norton*, 1910, 2 K.B., p. 501; *R.* v. *Loates*, 5 Cr. App. Rep., 193; *R.* v. *Wilson*, 6 Cr. App. Rep. 207), or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance (*R.* v. *Westacott*, 1 Cr. App. Rep., 248; *R.* v. *Mullins*, 5 Cr. App. Rep. 13), or most unlikely to have affected the verdict (*R.* v. *Solomon*, 2 Cr. App. Rep., 80). 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 (*R.* v. *Fisher*, 1910, 1 K.B. 149). The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute "highly 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 Beluchistan 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. 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.