CRIMINAL MISCELLANEOUS.

Before C. C. Ghose and Dural, JJ.

1926

Feb. 19.

THOMAS

v.

EMPEROR.*

Limitation—Application for leave to appeal from conviction at the High Court Sessions—Limitation of appeal—Affidavit of status, sufficiency of—Criminal Procedure Code (Act V of 1898), s. 449 (1) (c)—Limitation Act (IX of 1908), Arts. 150A, 155—Evidence Act (I of 1872), s. 32.

On an application for leave to appeal under s. 449 (*1*) (*c*) of the Criminal Procedure Code, the question of limitation of the appeal arises because, if the appeal is barred, the application for leave is necessarily out of time.

An appeal under s. 449 (*1*), from the conviction and sentence passed by a Judge at the Original Criminal Sessions of the High Court, is governed by Art. 155 of the Limitation Act (IX of 1908).

An affidavit by the wife of the accused that she heard from his grandparents, while they were all living together, that the grand-father was born in England of English parents and married in India in 1861, though not denied by the Crown by counter-affidavit, *held* insufficient to enable the Court to determine the status of the accused, in the absence of evidence such as the grand-father's baptismal and marriage certificates, when the Court was not satisfied that fuller and sufficient particulars could not have been procured by the deponent.

The accused was tried at the Fourth Criminal Sessions of the High Court, on the 27th and 28th July 1925, before B. B. Ghose J., and a special jury, on a charge under section 471 of the Indian Penal Code. He was found guilty by the jury and convicted and sentenced to two years' rigorous imprisonment.

*Criminal Miscellaneous, No. 31 of 1926—Application for leave to appeal against the order of Mr. Justice B. B. Ghose presiding at the Fourth Criminal Sessions of the High Court.

1926

THOMAS v. EMPEROR.

The facts were that one Sookan, a *coolie* employed by the accused in his business of a taxidermist, sued him in the Small Cause Court of Calcutta for the recovery of Rs. 49 odd as wages. The defendant, in answer, filed a receipt for the amount, purporting to bear the thumb-mark of the plaintiff Sookan, and alleged to have been given by the latter in full satisfaction of his claim. Expert evidence was given that the thumb-impression on the receipt was not that of Sookan. Thereupon, the presiding Judge, Mr. M. Rahman, filed a complaint against the accused, and sent it to the Chief Presidency Magistrate who took cognizance and, after a preliminary investigation, committed the accused for trial. The accused was tried and sentenced as stated above, and presented his application for leave to appeal to the Acting Chief Justice, on the 16th February 1926, and the learned Chief Justice directed the Criminal Bench to dispose of the matter.

Mr. H. M. Bose (with him *Babu Bhagirath Chandra Das*), for the accused. The only question for the Court, on an application for leave, is whether the case, if it had been tried outside a Presidency town, would have been triable under Chapter XXXIII, that is, whether the case falls within s. 443 (1) (*a*) and (*b*) or not. There is an absolute right of appeal if the status is established: *Emperor* v. *Turner* (1). The question of limitation is for the Bench admitting the appeal. In *Emperor* v. *Turner* (1) the application was made more than two months from the date of conviction.

[GHOSE J. remarked that it was made within two months, after deducting the time for taking copies of the necessary papers.]

(1) (1925) I. L. R. 52 Calc. 636.

1926

THOMAS v. EMPEROR.

Mr. Bose. I submit that copies of the charge and evidence are not necessary for the application for leave and cannot be deducted, and that the application was filed in that case after two months from the conviction and no objection was taken by the Crown on the ground of limitation. There is no limitation for appeals from a Judge at the Sessions. Act XII of 1923 introduced a limitation for appeals under s. 443 (*2*), but made no provision for appeals under s. 449. If the Legislature intended any limitation as to the latter class of appeals, it would have provided for it. Article 154 of the Limitation Act applies to appeals from the Lower Courts to the Court of Session. Article 155 is to be read with Art. 154, and is ancillary to it, and deals with the same class of appeals, that is from the Lower Courts, but lying to the High Court. The affidavit is not controverted by the Crown and ought, therefore, to be accepted. It is quite sufficient within s. 32 of the Evidence Act. It is practically impossible for the accused to produce documents proving his grand-father's birth in England, and his marriage in India so far back as 1861.

Mr. A. K. Basu, for the Crown, was not called upon to reply.

GHOSE AND DUVAL JJ. This is an application by O. W. Thomas, who is a prisoner in the Presidency Jail, for leave to appeal, after determination of his status, against his conviction and against the sentence passed on him by Mr. Justice B. B. Ghose presiding at the Fourth Criminal Sessions held in this Court in July, 1925.

The prisoner was found guilty by a special jury of having committed an offence punishable under s. 471, and thereafter the learned Judge presiding at the sessions sentenced him to undergo rigorous

imprisonment for a period of two years. This was on the 27th July 1925.

The present application was not presented to the learned Acting Chief Justice till the 16th February 1926. The question, therefore, arose whether, if the appeal itself had been presented on the 16th February 1926, it would have been within time. Learned counsel, who appears in support of the application, suggests that the only matter for our determination at this stage is one under section 449, sub-clause 1(*c*) read with section 443, sub-clause 1(*a*) of the Code of Criminal Procedure, for the determination of the status of the prisoner, and that the question of limitation does not arise on the present application. We are unable to agree with learned counsel on this point, and we must examine the question whether the present application itself is on the facts of this case within time. An application such as the present one for the determination of the prisoner's status must necessarily precede an application for leave to appeal. There are, no doubt, three stages in cases of this description—(i) the question of the determination of the status of the prisoner, (ii) application for leave to appeal, and (iii) admission of the appeal itself. If, as will appear from the facts of this case, no application for leave to appeal can now be presented, inasmuch as the time to prefer an appeal has expired, the application for the determination of the prisoner's status so as to enable him to apply for leave to appeal must necessarily be out of time.

It appears to us that appeals under section 449, sub-clause 1(*c*), must be governed by Article 155 of the subdivision of the First Schedule to the Limitation Act. That Article provides that "except "in cases provided for by Articles 150 and 157, the "period of limitation for an appeal to the High Court

1926

THOMAS v. EMPEROR.

"is 60 days from the date of the sentence or order "appealed from." In this case, as appears from the date already mentioned, 60 days from the date of the sentence passed on the prisoner expired long ago; but learned Counsel for the applicant contends that Article 155 has no application to the facts of this case, inasmuch as it is an appeal to the High Court from an order or sentence passed by a Judge of this Court presiding at the Ordinary Original Criminal Sessions of this Court. It appears to us, however, that this contention has no substance in it. When the Code of Criminal Procedure was amended in 1923 by the Legislative Assembly of India, the attention of the Legislature was drawn to the provisions of the Indian Limitation Act (see in this connection Article 150A of the Limitation Act), and while the Legislature introduced deliberately the amendments which were embodied in Act XII of 1923, viz., the Criminal Procedure Code (Amendment Act), they did not choose to amend or modify in any way the provisions of Article 155 of the Limitation Act. The appeal that the prisoner seeks to file is an appeal to the High Court in the words of section 449 of the Criminal Procedure Code, read with section 443 of the Criminal Procedure Code, and there is in our opinion no reason whatsoever for thinking that Article 155 of the Limitation Act is only limited to appeals to the High Court from the Sessions Courts in the mofussil, or from other Courts to which appeals to the High Court lie direct, and has no application to appeals like the present one. We, therefore, hold that appeals of this nature must be governed by Article 155 of the Limitation Act.

Now, as will appear from what has been stated above, if the prisoner wanted to file an appeal now, he would be out of time. It follows, therefore, that

an application presented now for the determination of the status of the prisoner under section 449, read with section 443 of the Criminal Procedure Code, must necessarily be out of time.

In our opinion the application must fail on that ground alone; but learned counsel has contended that in the case of *Emperor* v. *Turner* (1), although the prisoner was out of time as regards his appeal to this Court, the appeal itself was heard and determined by a Bench of two Judges of this Court. Now, we have sent for the record in the case of *Emperor* v. *Turner* (1), and it appears to us, on examination of the record in that case, that the appeal of the prisoner Turner was not out of time; it was presented within time as laid down in Article 155 of the Limitation Act, after allowing time for obtaining copies of the necessary documents in that case.

Although in our opinion the present application is out of time, we have, however, examined the merits of the application itself. The only material paragraph is paragraph (2) in the affidavit of Marie Thomas, the wife of the prisoner, sworn on the 4th January 1926. In our opinion, the statements contained are purely hearsay, and they are insufficient to enable us to determine the status of the prisoner as being that of a European British subject. There are really no materials in the affidavit itself in support of the statements made in paragraph (2) thereof. We have not had produced before us either the baptismal certificate of the grand-father or the certificate of marriage of the grand-father, which is alleged to have been celebrated in 1861. Attention has been drawn to the provisions of section 32 of the Indian Evidence Act. Before we can apply section 32 of the Indian Evidence Act, there must be

(1) (1925) I. L. R. 52 Calc. 636.

1926

THOMAS v. EMPEROR.

statements in the affidavit itself free from all inherent weaknesses. We are not satisfied that fuller and sufficient particulars could not have been procured by the deponent of the affidavit, and in this view of the matter we must hold that it has not been shown to us satisfactorily that the status of the prisoner is that of a European British subject.

The result, therefore, is that this application must be dismissed on both the grounds stated above.

E. H. M. *Application refused.*

APPELLATE CIVIL.

Before Cuming and Page JJ.

1926

March 19.

MIDNAPUR ZAMINDARY CO., LTD.

v.

AMULYA NATH ROY CHOWDHURY*

Substitution—Suit for joint possession—During pendency of second appeal substitution not made in time, if appeal competent to proceed.

Several co plaintiffs sued the defendants for joint possession and obtained a decree. The defendants-appellants failed to substitute in time the legal representative of one of the plaintiffs-respondents who had died during the pendency of the second appeal to the High Court. At the hearing of the second appeal the respondents took a preliminary objection that the appeal could not proceed against the other co-respondents in the absence of the dead co-respondent, or his duly substituted representative :—

Held, that the appeal abated as a whole.

SECOND APPEAL No. 250 of 1924 by the Midnapur Zamindary Co., Ltd., the defendants.

* Appeals from Appellate Decrees Nos. 249 and 250 of 1924, against the decree of Maulvi Osman Ali, Subordinate Judge of Nadia, dated June 29, 1923, revising the decree of Pranendra Narayan Chowdhury, Munsif of Kushtia, dated April 19, 1922.