CRIMINAL REVISION.

Before McNair and Khundkar JJ.

KRISHNA KAHAR

v.

EMPEROR.*

1939

July 27.

Admissibility—*Evidence of test-identification before the police, if admissible—Test of competency of a child witness—Code of Criminal Procedure (Act V of 1898), s. 162—Indian Evidence Act (I of 1872), s. 118.*

Evidence relating to the test-identification of the accused by witnesses before the investigating officer is inadmissible on behalf of the prosecution under s. 162 of the Code of Criminal Procedure.

Krishnachandra Dhenki v. *Emperor* (1); *Harendra Nath Saha* v. *Emperor* (2) and *Keramat Mandal* v. *King-Emperor* (3) followed.

Section 118 of the Indian Evidence Act vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of that section. The true rule is stated in the cases of *Nafar Sheikh* v. *Emperor* (4) and *Wheeler* v. *United States* (5).

Sheikh Fakir v. *Emperor* (6) referred to.

This discretion, however, must be exercised in a judicial manner. In a case where, from a note made by the Magistrate at the end of the deposition of a child witness, it appears that the latter was unable to discriminate between the meanings of many of the questions which he was called upon to answer, it was incumbent upon the Magistrate to question him himself for the purpose of ascertaining his power of understanding and of giving rational answers.

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The material facts of the case and the arguments in the Rule appear sufficiently from the judgment.

Anil Chandra Ray Chaudhuri for the petitioner.

Lalit Mohan Sanyal for the Crown.

*Criminal Revision, No. 540 of 1939, against the order of S. M. Bhaumik, Magistrate, First Class, of Alipore, dated April 26, 1939, affirming the order of N. M. Mukherji, Magistrate, Second Class, of Basirhat, dated Mar. 14, 1939.

(1) (1935) I. L. R. 62 Cal. 918.
(2) (1924) 40 C. L. J. 313.
(3) (1925) 42 C. L. J. 524.
(4) (1913) I. L. R. 41 Cal. 406.
(5) (1895) 159 U. S. 523.
(6) (1906) 11 C. W. N. 51.

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KHUNDKAR J. This is a Rule calling upon the District Magistrate of the 24-*Parganâs* to show cause why the conviction of and sentence passed upon the petitioner should not be set aside. The petitioner was convicted under s. 379 of the Indian Penal Code for having stolen a necklace from a small girl, who is prosecution witness No. 1. An appeal by the petitioner against his conviction was dismissed by a First Class Magistrate.

The Rule is confined to three grounds which are as follows:—

(1) For that the trial has been vitiated by the admission of inadmissible evidence, namely, the identification, before the investigating officer which forms the main basis of the judgments of both the Courts.

(2) For that the trial is vitiated by the admission of testimony on oath or otherwise of little children who themselves admitted that they did not know the difference between truth and falsehood.

(3) For that in view of the age and antecedents of the petitioner, the sentence is much too severe.

The case for the prosecution may be briefly stated.

On November 10, 1938, at about 3 p.m., two children, prosecution witness No. 1 Amina Dasi, a girl of 5, and her cousin Amiya, a boy of 7, were returning home after having purchased some sweets at a shop in the village. As they were passing along the side of a tank the accused suddenly appeared and snatched away a gold necklace from the neck of prosecution witness No. 1. The prosecution alleged that both the children recognised the accused at this time and also when he was running away. The theft was witnessed also by prosecution witness No. 4, who chased the accused, but failed to catch him. It is further alleged that another witness, prosecution witness No. 7, saw prosecution witness No. 4 in the act of chasing the accused.

Shortly after the occurrence, prosecution witness No. 4 and prosecution witness No. 3, who is the father of prosecution witness No. 2, and the uncle of

prosecution witness No. 1, came across the petitioner near the police-station, to which they were proceeding for the purpose of lodging an information. They took him to the police-station and charged him with the offence. His person was searched but the necklace was not found.

During the course of the investigation the investigating officer held a test-identification parade at which the two children, prosecution witnesses Nos. 1 and 2, picked out the petitioner from a number of other persons.

The argument advanced before us in support of this Rule is thus presented: The case for the prosecution rests on the evidence of the two children, prosecution witnesses Nos. 1 and 2, and of prosecution witness No. 4. In accepting the evidence of the children, the Courts below have relied strongly upon the result of the test-identification parade just referred to. It is contended that the evidence of this test-identification is inadmissible, and further that the evidence of the children should have been expunged, because they were not competent to testify as witnesses within the meaning of s. 118 of the Indian Evidence Act. Mr. Ray Chaudhuri, on behalf of the petitioner, has argued that if the evidence of the test-identification and the testimony which the children bore are excluded the evidence which remains is totally insufficient to support the conviction. It is pointed out that the only remaining evidence consists of the testimony of prosecution witness No. 4, which, according to the prosecution, was corroborated by the testimony of prosecution witness No. 7.

Now, in regard to the test identification parade held by the investigating officer, it is not disputed that it was conducted during the investigation of the case under Chap. XIV of the Code of Criminal Procedure. It is contended that the statements

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made by prosecution witnesses Nos. 1 and 2 to the investigating officer at the time when they picked out the accused as the person who had stolen the necklace are hit by the prohibition contained in s. 162 of the Code. Reference has been made in this connection to a number of cases. In the case of *Krishnachandra Dhenki* v. *Emperor* (1), it has been very clearly laid down that the evidence of a test-identification held by the police in course of investigation, that is to say, a statement expressed or implied, made to the police by way of identifying the accused, is inadmissible in law in view of the provisions of s. 162 of the Code of Criminal Procedure. In the case of *Harendra Nath Saha* v. *Emperor* (2), it was held that a number of statements made to the investigating officer by witnesses at a time when they were purporting to identify an accused person by pointing him out were wrongly admitted in evidence. In the case of *Keramat Mandal* v. *King-Emperor* (3), it would appear that during the investigation, one of the witnesses, accompanied the investigating officer to certain places which she pointed out to him. At p. 526 of the report there occurs this observation :—

> The statements that were made by the witness to the police officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought out in evidence on behalf of the defence as provided by s. 162 of the Code.

Apart from other objections of a general nature to the practice of permitting test-identifications to be conducted by police-officers, we have no doubt that in the facts of the present case the identification of the petitioner by prosecution witnesses Nos. 1 and 2 before the investigating officer amounted to statements which are rendered inadmissible by the provisions of s. 162 of the Code.

The second branch of the contention advanced on behalf of the petitioner relates to the competency of

(1) (1935) I. L. R. 62 Cal. 918. (2) (1924) 40 C. L. J. 313.
(3) (1925) 42 C. L. J. 524.

the two children as witnesses. Section 118 of the Evidence Act is in these terms:—

> All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

This section relates to capacity to give legal testimony and vests a discretion in the Court to decide whether a person of tender years possesses or lacks such capacity by reason of that person's power of understanding and of giving rational answers to the questions put. Strangely enough in the present case the record of the deposition of prosecution witness No. 1 is followed by a note made by the learned Magistrate which is in these terms:—

> The witness is a minor, her answer was a running "yes" to every question put to her even to contradictory questions.

If this observation means anything, it certainly indicates that the witness was unable to discriminate between the meanings of many of the questions which she was called upon to answer. We have just referred to the fact that the section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. It cannot be disputed that this discretion must be exercised in a judicial manner. In the case of *Sheikh Fakir* v. *Emperor* (1), the broad proposition was laid down that before a child of tender years is asked any questions bearing on the *res gestæ*, the Court should test his capacity to understand and give rational answers, and his capacity to understand the difference between truth and falsehood, and the Judge should form his opinion as to the competency of the witness before his actual examination commenced. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of s. 118 of the

(1) (1906) 11 C. W. N. 51.

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Indian Evidence Act. In our judgment, the true rule has been stated in the case of *Nafar Sheikh* v. *Emperor* (1). At p. 414 of the report there is a quotation from the judgment in the case of *Wheeler* v. *United States* (2), which is in these terms :—

> The decision of this question (whether the child-witness has sufficient intelligence) primarily rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession of lack of intelligencee, and may resort to any examination which will tend to disclose his capacity, and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, t' decision of the trial Judge will not be disturbed on review, unless from that which is preserved, it is clear that it was erroneous.

Immediately after the quotation just repeated there appears in the judgment in the case of *Nafar Sheikh* v. *Emperor* (*supra*) the following sentence :—

> The mere circumstance that the Sessions Judge did not interrogate the witnesses, before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of s. 118 of the Indian Evidence Act, invalidate the trial.

But the judgment goes on to hold that the circumstances of the case made it plainly desirable that such a course should have been pursued. It is clear that the learned trial Magistrate's own impression of the witness's intelligence was such as to make it incumbent upon him to question her himself for the purpose of ascertaining her power of understanding and of giving rational answers. He has not done so, and from the note which he has recorded we are left in hesitation and doubt as to whether this child witness had the capacity to depose. In the circumstances stated we are not prepared to say that the evidence of prosecution witness No. 1 should be admitted and accepted.

There is no observation by the learned Magistrate of a similar nature with regard to the evidence of the other child witness, that is, prosecution witness No. 2. We have been through the evidence of this witness with great care, and we find that his story virtually is that he recognised the accused from

(1) (1913) I. L. R. 41 Cal. 406. (2) (1895) 159 U. S. 523.

behind when the latter was running away with his back towards the child. It is true that this witness says immediately afterwards that he also recognised the accused when he was snatching away the necklace. We are not prepared to attach much credence to the latter statement because it has the appearance of an after-thought. It should be noted that this witness stated that when the accused was in the act of committing the theft, Hare Krishna, that is, prosecution witness No. 4, called out "Krishna don't snatch it, don't snatch it". Now this statement is not borne out by the evidence of prosecution witness No. 4 himself. His testimony is to the effect that he heard the child crying out that the necklace was being snatched away, that he then saw the accused in the act of running away, and of thrusting the necklace into the pocket of his garment, and that upon that the witness gave chase. The evidence of prosecution witness No. 4 is said to be corroborated by the evidence of prosecution witness No. 7. According to the prosecution, the latter saw prosecution witness No. 4 running after the accused. Upon examining his evidence, however, we find that what he actually stated was "I saw Hare Krishna chasing Krishna "(looking like this accused)". It is very clear that prosecution witness No. 7 cannot be taken to have said that he recognised the accused as the man who was being chased by prosecution witness No. 4.

Against the credibility of prosecution witness No. 4, two circumstances have been pointed out. The first is that there are materials on the record, which have not been displaced, showing that this witness and the accused were on terms of enmity. The second is that prosecution witness No. 4 admitted in his evidence that, at the time when he heard the child calling out that Krishna was taking away the necklace, he was on the road behind a bend. Now another witness who was examined on behalf of the prosecution, that is, prosecution witness No. 5, has stated in his testimony that when he heard the

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child crying out, he also was around that bend in the road and that the place where the child was crying was not visible from where the witness happened at the time to be.

In view of all these circumstances, we are not prepared to say that the evidence of prosecution witness No. 2, coupled with that of prosecution witness No. 4, provides that margin of safety which is necessary to a conviction for a criminal offence.

The Rule is accordingly made absolute. The conviction and sentence passed upon the petitioner are set aside and he will be set at liberty forthwith. If he is on bail, he will be discharged from his bail bond at once.

McNAIR J. I agree.

Rule absolute. Accused acquitted.

A. C. R. C.