

quently, under the circumstances, the decree of the Judge of Rungpore will be upheld, and the decree of this Court reversed with costs.

FUZZU
KHAN
v.
FAKIR MAHO-
MED KHAN.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Broughton.

THE EMPRESS v. GONESH DOOLEY AND GOPI DOOLEY
(ACCUSED).*

1879
July 28.

Indian Penal Code, ss. 304, 304a—Culpable Homicide—Causing Death by negligence.

A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without any intention to cause harm to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence.

Held, the snake-charmer was guilty, under s. 304 of the Penal Code, of culpable homicide not amounting to murder, and not merely of causing death by negligence, an offence punishable under s. 304a.

The Queen v. Poonai Fattemah (1) distinguished.

IN this case, Gonesh and Gopi, two snake-charmers, having caught a venomous snake, a cobra, proceeded, a few days afterwards, to exhibit it in a public place, before a crowd, among whom was a boy named Brojo. Gonesh appears to have selected Brojo as a suitable person to help him in showing off his dexterity with the snake, whose fangs had not been extracted. In the course of the exhibition, Gonesh put the snake on the boy's head. The boy took fright, either because the snake fell upon his shoulder, or for some other reason, and, in trying to push away the snake, was bitten in the hand, and died shortly afterwards. Under these circumstances, both Gonesh and Gopi were charged with murder, culpable homicide not amounting to murder, and with causing death by negligence, offences punishable under ss. 302, 304, and 304a of the Indian Penal Code.

* Criminal Reference, No. 204 of 1879, from an order made by W. H. Verner, Esq., Officiating Additional Sessions Judge of the 24-Parganas, dated the 28th June 1879.

THE JURY were of opinion that exhibitions of this description by snake-charmers were warranted by custom; that there was no intention on the part of the prisoners or either of them to kill the boy; and that his death was purely the result of an accident, and accordingly acquitted the prisoners.

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GOPI DOOLEY.

The Sessions Judge, differing from the jury, thought that the case fell under s. 304a, as the accused persons, being by profession snake-charmers, were perfectly well aware of the deadly nature of the snake, and that it was, therefore, an act of the grossest negligence on their part to expose the boy and the spectators to the risk which was necessarily incurred by every one near whom a poisonous snake was set at large.

On the case being referred to the High Court under s. 263 of the Criminal Procedure Code, the following order was made by

McDONNELL, J.—The Officiating Additional Judge of the 24-Parganas, differing from the jury, has referred this case to the High Court under s. 263 of the Code of Criminal Procedure. (His Lordship stated the facts of the case and continued):—We think that the offence committed by the prisoner Gonesh was an offence under s. 304 of the Indian Penal Code. He did not intentionally cause the boy's death; nor did he, knowing that the act was "so imminently dangerous that it must, in all probability, cause death," put the snake upon the boy.

The case of *The Queen v. Poonar Fattemah* (1), put by the prosecution and referred to by the Judge in the charge, was one in which the prisoner actually caused the snake to bite the person who was killed. It differs, as the Judge remarks, materially from the present case, because then there was clearly the knowledge of imminent danger that must in all probability cause death.

The Judge, in referring the case, was of opinion, that the prisoner should be punished under s. 304a, but this section does not apply to the present case, in that, for the reasons stated above, we consider that the "rash act" did amount to culpable homicide.

We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death. We think Gonesh should be sentenced to three years' rigorous imprisonment. Gopi, we think, abetted Gonesh, and is punishable under ss. 114 and 304, Indian Penal Code; but as he took a less active part in the matter, he should be rigorously imprisoned for one year only. We sentence the prisoners accordingly.

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 DOOLEY AND
 Gopi DOOLEY.

Verdict set aside.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice White.

TARUCK NATH MULLICK, MANAGER OF THE COOCH BEHAR CHUKLA-
 JUT ESTATE, ON BEHALF OF THE COURT OF WARDS (PLAINTIFF) v.
 JEAMAT NOSYA (DEFENDANT).*

1879
 June 13.

*Practice—Procedure when Defendant does not appear—Hearing ex parte—
 Civil Procedure Code (Act X of 1877), s. 100—Evidence—Refreshing
 Memory—Evidence Act (I of 1872), s. 159.*

When the plaintiff in a suit appears at the hearing, and the defendant does not appear, the proper procedure to follow, is that prescribed by s. 100 of Act X of 1877, whether the defendant has been summoned only to appear and answer the claim, or has in addition been summoned to attend and give evidence.

It is not necessary, before proceeding to hear and determine a suit *ex parte* under s. 100, that all the process prescribed by law for compelling the attendance of the defendant as a witness should be exhausted. It is sufficient that due service of the summons upon the defendant is proved. If such proof is not given, the courses to be adopted are one or other of those mentioned in clauses (b) and (c) of s. 100 according to the circumstances of the case.

The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were

* Small Cause Court Reference, No. 10 of 1879, made by Baboo Chundee Churn Roy, Munsif of Julpigoori, to H. Beveridge, Esq., District Judge of Rungpore, and forwarded by him to the High Court on the 14th April 1879.