

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Oldfield.

*Re G. CHINA VENKADU (PRISONER).**

1913.
November 10.

*Indian Oaths Act (III of 1873), ss. 5 and 13—Evidence, admissibility of,
where witness not sworn.*

The evidence of two children aged eight and six years was admitted against an accused person without the children having been sworn or affirmed,

Held, that in view of section 13, Indian Oaths Act, the failure to administer oath or affirmation did not render the evidence inadmissible.

Queen-Empress v. Viraperumal (1898) I.L.R., 16 Mad., 105 (PARKER, J.), followed.

Queen-Empress v. Maru (1888) I.L.R., 10 All., 207, dissented from.

Per Curiam: Section 5 of the Oaths Act is imperative and if a Court holds that a person may lawfully give evidence, it is the duty of the Court to administer oath or affirmation to that witness.

CASE referred by F. A. COLERIDGE, the Sessions Judge, Kistna Division at Masulipatam, for confirmation of the death sentence passed upon the said prisoner in Calendar Case No. 25 of 1913.

Also appeal by the prisoner against the said sentence.

The facts of the case are set out in the judgment.

A. Nilakanta Ayyar for the prisoner.

The Public Prosecutor for the Crown.

AYLING AND
OLDFIELD, JJ.

JUDGMENT.—The appellant has been convicted of the murder of his wife on the night of July 25th. The direct evidence against him is that of two of his children, prosecution witnesses Nos. 4 and 5, who say they awoke in the middle of the night and saw the appellant cutting his wife's throat. These witnesses, who are aged eight and six years, were not affirmed or sworn by the Sessions Judge; and it is argued by the appellant's *vakil* that their evidence is on this account inadmissible and should be excluded from consideration. In reply to this the Public Prosecutor relies on section 13 of the Indian Oaths Act.

The authorities on the subject are not uniform; but it appears to be the view of both the Bombay and Calcutta High Courts that the failure by a Court to administer oath or affirmation to a witness does not render the evidence of that witness inadmissible. The same view was taken by PARKER, J., in the only reported case of this Court—*Queen Empress v. Viraperumal*(1)

* Referred Trial No. 41 of 1913 (Criminal Appeal No. 493 of 1913).
(1) (1898) I.L.R., 16 Mad., 105.

bearing on the point, although COLLINS, C.J., was of a different opinion. In an unreported case *Queen-Empress v. Perumal*(1) referred to therein WILKINSON, and MUTTUSWAMI AYYAR, JJ., took the same view as PARKER, J.

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It is only in the Allahabad High Court that the opposite view has prevailed, *vide Queen-Empress v. Maru*(2). Both on a construction of section 13 and in view of the authorities above referred to, we are inclined to hold that section 13 applies to a case of this kind, and that the evidence is admissible.

We are, at the same time, constrained to point out that section 5 of the Oaths Act is imperative; and if a Court holds that a witness may lawfully be examined or give or be required to give evidence (in other words, is competent to testify) it is the duty of the Court to administer oath or affirmation to that person before recording his evidence. We see no reason for not acting on the evidence of the children.

Even if that evidence were left out of account there remains sufficient circumstantial evidence to warrant the inference that the appellant murdered his wife. [The Court then proceeded to deal with the facts.]

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

Re ROSARIO QUADROS, ACCUSED IN CALENDAR CASE NO. 210 OF 1913 ON THE FILE OF THE COURT OF THE SECOND-CLASS MAGISTRATE OF MANGALORE TOWN.*

1913.
November 20.

Workman's Breach of Contract Act (XIII of 1859)—Bandsman not an artificer, labourer or workman.

A bandsman is not an artificer, labourer or a workman within the meaning of those words in the Workman's Breach of Contract Act (XIII of 1859).

CASE referred for the orders of the High Court under section 438, Criminal Procedure Code, by M. E. COUCHMAN, the District Magistrate of South Canara, in his Reference 2nd of August, 1912.

The two counter-petitioners entered into a contract under the Workman's Breach of Contract Act (XIII of 1859) on the

(1) (1893) I.L.R., 16 Mad., 105 at p. 111. (2) (1888) I.L.R., 10 All., 207.

* Referred Case No. 77 of 1913 (Criminal Revision Case No. 530 of 1913).