1886

BABORI LAL v. GAURI SAHAI.

edly such as are contemplated by ss. 278-281 of the Civil Procedure Code. The 14th November, 1885, was fixed for the hearing of the objections; but the objector died in the meantime, and the present appellant had his name substituted as the representative of the objector, and the objections were disposed of on the 7th December, 1885, and this is the order from which this appeal has been preferred.

Upon this state of things, I am not prepared to dissent from the learned Chief Justice in the view that the case is not on all fours with the Privy Council ruling in *Wahed Ali's Case* (1), and that it is distinguishable from the other rulings to which reference has been made. Nor am I prepared to dissent from him in the view that the mere circumstance of the representative of a deceased judgment-debtor becoming the representative also of a deceased third party, who was objector in the execution-proceedings, will not preclude him from prosecuting those objections, and that the adjudication upon such objections falls beyond the scope of s. 244 of the Code. Indeed, as the learned Chief Justice has pointed out, the matter was dealt with in the Court below as objections by a third party, and there can be little doubt that the order of the 7th December, 1885, now under appeal, was passed under s. 281 of the Code, as it disallowed the objections upon the ground that the appellant had inherited nothing from the original objector, Musammat Bijai Kuar. And this being so, I am not willing to disagree with the learned Chief Justice in holding that, under the circumstances of this case, the proper remedy for the appellant would be a suit such as is contemplated by s. 283 of the Code.

For these reasons I concur in the order which the learned Chief Justice has made.

Appeal dismissed.

CRIMINAL REVISIONAL.

1886
August 2.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* LOCHAN.

Murder—Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 (*Penal Code*), *ss.* 300, *Exception* 1, 302, 304.

An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence

(1) 11 B. L. R. 149.

1886

QUEEN-EMPRESS v. LOCHAN.

showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her with the chopper.

Held that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress* v. *Damarua* (1) and *Queen-Empress* v. *Mohan* (2) referred to.

THIS was a case the record of which was called for by Straight, Offg. C. J., in the exercise of the High Court's powers of revision. The case was one in which one Lochan had been convicted by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, of culpable homicide not amounting to murder, and sentenced to five years' rigorous imprisonment, the Sessions Judge's order being dated the 11th March, 1886.

The facts of the case are stated in the order of the Court.

Neither the prisoner nor the Crown was represented.

STRAIGHT, Offg. C. J.—This is a case of revision in reference to a decision of the Judge of Gorakhpur, convicting the accused Lochan of culpable homicide not amounting to murder, and sentencing him to five years' rigorous imprisonment. The case was called up by me, on perusal of the Gorakhpur sessions statement for March, and we have had notice issued to the accused to show cause why the conviction recorded against him should not be altered to one of murder under s. 302 of the Penal Code, and why his sentence should not be enhanced to that provided for that offence.

The circumstances of the case are shortly these. The accused Lochan, son of Janki, Sainthwar by caste, aged 25, resided at the village of Balohi in the Tarkalwa Police circle. Along with him lived Musammat Jadni, deceased, aged about 25, the widow of his deceased first cousin Ramphal. On the evening of Thursday, the 10th of December last year, about 8 o'clock, the accused was near his house, cutting up sugar-cane with a *gandasa*, and near by him were two men, Wali *Julaha* and Musa *Ahir*. According to the evidence of these persons the deceased, Musammat Jadni, passed

(1) Weekly Notes, 1885, p. 197. (2) *Ante*, p. 622.

close to them alone, going in a southerly direction, and soon after she had gone on her way, the accused followed, taking his *gandasa* with him. As to what then happened we learn from the evidence of one Beni Madho, a caste-fellow of the accused, who says that on the night of the 10th the accused came to him and stated that Musammat Jadni was lying dead in the *arhar* field. "She was committing fornication with Phul, Panthwar. I went up, and Phul ran away. I then killed her with my chopper." The body of Musammat Jadni was found on the 11th lying under a mango tree, with a number of wounds upon the neck, head, and arms, and it was obvious that death must have supervened almost immediately upon the infliction of these injuries. Complaint was lodged at the Tarkalwa police station on the morning of the 12th, and the accused was, in due course, arrested. Before the Magistrate Phul, the man referred to by the accused in his statement to Beni Madho, deposed to the effect that he was in the act of having connection with Musammat Jadni under the mango tree when he was surprised by the accused; that he thereupon jumped up and ran away, and as he ran he turned round and saw the accused striking the deceased woman. In the Sessions Court he denied that he was in the act of having connection with Musammat Jadni when the accused came up, and stated he was only conversing with her. The assessors did not believe the evidence for the prosecution, but such reasons as they gave for not doing so appear to be quite insufficient. The learned Judge was of opinion that the guilt of the accused, of having caused the death of Musammat Jadni, was fully established; but he considered that, having regard to all the facts, the act of the accused in doing so was, by reason of grave and sudden provocation, reduced to culpable homicide not amounting to murder. He therefore convicted him of that lesser offence, and sentenced him to five years' rigorous imprisonment. With regard to this decision, all I have to say, in the first place is, that the evidence and all the surrounding circumstances, to my mind, place it beyond doubt that the hand of the accused did the unfortunate act which caused the deceased woman's death. I see no reason whatever for distrusting the testimony of Beni Madho, and I think the learned Judge gives a reasonable explanation of his somewhat singular conduct in not at once reporting what the

1886

QUEEN-EMPRESS v. LOCHAN.

accused had said to him on the night of the commission of the crime. No doubt there is the contradiction to which I have already adverted in Phul's two depositions; but the learned Judge has preferred that made in the first instance before the Magistrate, and it was in the prisoner's interest that he did so, for the purpose of measuring the nature of his offence; and though he may have so far discredited his later statement, I do not think this discrepancy should invalidate the rest of his evidence. But I think the learned Judge was wrong in holding that there was grave and sudden provocation of the kind that reduced the offence of the accused from murder, with which he was charged, to culpable homicide not amounting to murder. I have already, in the case of *Queen-Empress* v. *Damarua* (1) stated the rule, as I believe it to be, which governs the matter, and my brother Brodhurst and I have recently acted on the same view in *Queen-Empress* v. *Mohan* (2). In the first place, the relation in which the accused stood to the deceased was not that of a husband, though it is quite possible, from her living in the house with him, that they were on intimate terms, and that his act may have been animated by jealousy. But there is no proof of this, and I must take the accused's own version of the matter; and even adopting the learned Judge's view that he caught Musammat Jadni in the very act of connection, I am of opinion that there was no grave and sudden provocation proved of the character that a Court of Justice ought to accept as reducing the crime of murder to that of culpable homicide. The accused taking the chopper with him, and thereby indicating that he contemplated resorting to violence, followed the deceased woman a considerable distance, obviously, to my mind, with the belief that she was going to keep an assignation, and with the deliberate purpose of detecting her in doing so. He neither called her to come back, nor remonstrated with her, nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, he went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence. As I have already observed, he was not the husband of the woman, and there was no moral obligation upon him to constitute himself her executioner for her transgres-

(1) Weekly Notes, 1885, p. 197. (2) *Ante*, p. 622.

1886

QUEEN-EMPRESS v. LOCHAN.

sion. I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation, for (to quote a passage cited from *Oneby's Case*, 2 Lord Raymond, 1485, in "Russell on Crimes and Misdemeanours," Vol. I, 4th ed. p. 725) "in cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty." Such being the view I take of the case here, the conviction of the accused must be altered to one of murder under s. 302 of the Penal Code, and in accordance with s. 439 of the Criminal Procedure Code, the sentence will also be altered to that provided for the offence, namely, transportation for life. I think, however, that, having regard to the facts, and making allowance for the peculiarities of native character in reference to the misconduct of women of their families, especially among the less advanced and more ignorant residents of the rural districts, I may properly recommend the Government to commute the sentence to fourteen years' transportation.

MAHMOOD, J., concurred.

APPELLATE CIVIL.

1886
August 3.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HARDEO DAS (APPELLANT) *v.* ZAMAN KHAN (RESPONDENT).*

Execution of decree—Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.

S. 253 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

* Second Appeal No. 58 of 1886, from an order of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 15th April, 1886, reversing an order of Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 6th January, 1886.