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ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN.

decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondents—Messrs. *Oeame and Summerhays.*

APPELLATE CRIMINAL.

1887
December 19.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* POHP SINGH AND ANOTHER.

Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Act I of 1872 (*Evidence Act*), *s.* 80.

Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen-Empress* v. *Riding* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Edge, C.J.

Mr. *C. Dillon*, for the appellants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

EDGE, C.J.—This is an appeal by Pohp Singh and Jaswant Singh, who were convicted by the Sessions Judge of Agra, on the 12th November last, of the murder of Musammat Khamani, and were by him sentenced to death. The principal evidence for the prosecution was that of Suraj Pal, a Brahman of Dhanola, a Chamar, and of Pancham Singh, a Thakur. Those three witnesses deposed to having seen the prisoners kicking the deceased woman, who was apparently fifty-five years of age, and to having seen the woman, after she had been kicked and rendered insensible, dragged or carried by the prisoners to a well and thrown into it by them.

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The circumstances which led up to the commission of the crime, of which I believe the prisoners to be guilty, were that the deceased woman had held portions of some land as mortgagee, that a Raja had put the prisoners in possession of that land, and that on the day in question the prisoners, or one of them, was ploughing the land adversely to the rights of the deceased woman; that she objected to their doing so and made an outcry, upon which Suraj Pal came up, when he was assaulted by the two prisoners, Jaswant Singh striking him on the arm with a *lathi* and Pohp Singh striking him on the head. The old woman came to his assistance, when she was kicked in the manner described by those witnesses to whom I have referred. It appears to me that the story those witnesses told is the true one, and that the deceased woman, after she had been rendered insensible by the violence of the prisoners, was thrown into the well by them with the result that she died. For the defence there were several witnesses called. The first three of those, namely, Ganga Prasad, Gajraj Singh, and Jarra Singh, know nothing about the transaction. The fourth witness, Than Singh, says that the old woman, upon seeing Suraj Pal assaulted, went to the well and threw herself into it and that Ganga Prasad's wife accompanied the old woman to the well. We are told that Ganga Prasad's wife was Musammat Daryayi, who is mentioned in the petition of Pohp Singh; she was not called as a witness on either side. The next witness, Ganesh Prasad, says that after the fight Suraj Pal and Pohp Singh went off to the village, leaving the woman sitting in her field, and that she did not fall into the well in his presence. The evidence of these two witnesses is inconsistent, and I must say I do not believe it. The next witness, Sarawan Singh says that he heard that Musammat Khamani fell into the well, but he did not know how; in cross examination he said: "I saw Khamani falling into the well." Immediately afterwards he said that he heard she had, and that no one was near her at the time. It is obvious that this witness was not telling the truth. Those last three witnesses are the witnesses for the defendant, who appear to have been, according to their evidence, either at or near the place where the occurrence took place at the time. On behalf of Jaswant Singh an *alibi* was set up, which was supported by Khushal, Surat, and Har

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Prasad, and also Ganesh Prasad, to whom I have already referred. I believe that Jaswant was present on the occasion in question, and that he was one of the two men who kicked the deceased and threw her into the well, and I do not believe the *alibi*. On the 14th July, the day on which this took place, Suraj Pal made a complaint at the thana. He then, according to the evidence of Ram Dayal, Sub-Inspector of Jeitpura, charged these two prisoners with having beaten the woman and thrown her into the well. I thoroughly agree with the comments of the Sessions Judge on the conduct of Ram Dayal, and in my opinion the attention of the Government should be called to his conduct in this case. I have not a shadow of doubt in my mind that these two prisoners brought about that woman's death under circumstances which render them liable to be convicted of murder. I think they were properly convicted, and I am of opinion that this appeal should be dismissed and the sentences confirmed.

In the course of the argument in this case the deposition of Dr. A. Hilson, Civil Surgeon of Agra, was commented on by the counsel for the appellants, and that deposition, as printed in the paper book, was very properly made use of by that counsel in support of his contention that the Doctor's evidence was consistent with the defence of suicide, and he also contended that the deposition was at variance with the depositions of Suraj Pal and the other witnesses for the prosecution. I do not see, myself, that it is at variance with the evidence. However, the reason for which I have referred to the deposition has to do with the form in which that deposition has come before us. On examining the record we find two documents bearing the signature of Saiyad Muhammad Mohsin, who was in fact the Deputy Magistrate who committed the prisoners for trial. Now, one of those is in the vernacular and appears to be, as far as we can judge, a note or translation of the evidence of Dr. Hilson. It apparently bears the signature of Mr. Saiyad Muhammad Mohsin, with the additional letters "D. C.," which, I suppose, means Deputy Collector. Below the signature are the figures 20-9-87, and below them some hieroglyphics. That document does not purport to have been the deposition of Dr. Hilson taken and attested by the Magistrate in the presence of the accused. The concluding paragraph in that document, as

translated, reads thus: "The injury could be caused by a fall from a considerable height." The other document to which I refer bears the heading "Deposition of Dr. A. Hilson, Civil Surgeon of Agra, on S. A." That heading is written in black ink. Beneath that heading there is written in blue ink what I suppose was the evidence of Dr. Hilson. This document is described in the list of documents as the deposition of Dr. Hilson. It purports to bear the signature of A. Hilson, M.D., Civil Surgeon, and the signature of Saiyad Muhammad Mohsin. The body of the document is not in Mr. Mohsin's writing. Whether the name A. Hilson at the foot of the document was written by Dr. Hilson, or by the writer of the body of the document, I am unable to tell. It is quite obvious at any rate that the letters "M.D." and the words "Civil Surgeon" in blue ink at the foot of the document are in the same hand-writing as that at the head of the document in black ink. Now the last paragraph of this document as it stood originally read as follows: "The injury might have been caused by a fall from a considerable height." As it now appears, that paragraph reads thus: "The injury had been caused by a fall from a considerable height." The latter is the reading which is relied on for the defence—a reading which is consistent with the sentence immediately preceding it, as well as with the reading of the vernacular document to which I have just referred. How, or when, or by whom, this alteration was made there is nothing to show. That alteration is not vouched for or initialled in any way. If it be the fact that this document in English is a translation of the original deposition, the heading is misleading; the heading would lead one to infer that it was the original deposition. Whichever it is, there is nothing to show that it was taken or attested by the Magistrate in the presence of the accused. If either of these had been documents essential as evidence for the prosecution in this case, I should have declined to treat them as evidence against the accused under s. 509 of the Criminal Procedure Code of 1882. That section is as follows: "The deposition of a Civil Surgeon or other medical witness taken and attested by a Magistrate in the presence of the accused may be given in evidence in any inquiry, trial, or other proceeding under this Code, although the deponent is not called as a witness. The Court may, if it thinks fit, summon

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and examine such deponent as to the subject-matter of his deposition." As I have said, there is nothing on the face of either of these documents to show that either was taken or attested by a Magistrate in the presence of the accused. In the case *Queen-Empress* v. *Riding* (1) I rejected a document which was tendered as evidence under s. 509. In that case I was asked to presume that it had been taken and attested in the presence of the accused, and was pressed with s. 114, illustration (*e*), of the Evidence Act. There is a Reporter's note appended to that case. I infer that that note orignated in some one having considered that s. 80 of the Evidence Act would apply. I may say that, in my judgment, all depositions of witnesses in criminal cases should be taken and attested by the Magistrate in presence of the accused; but I am not aware of any provisions in these Codes which make the attestation of the deposition by the Magistrate in the presence of the accused obligatory. Unless it is made obligatory by the Codes that such attestation should take place in the presence of the accused, I fail to see how s. 80 of the Evidence Act can be held to apply by any who takes the trouble to read that section with ordinary care. The document may be genuine, and still it may not have been attested by the Magistrate in the presence of the accused. There is no statement on the face of the document as to the circumstances under which the deposition, if it was one, was taken, and as to the concluding words of s. 80, if there is no obligation imposed upon the Magistrate by the Code to attest the deposition in the presence of the accused, the evidence or statement might have been duly taken, although not attested by the Magistrate in the presence of the accused. I may go further and say that in this case there is nothing to show that what I assume for the moment to be the deposition of Dr. Hilson was either taken or attested by the Magistrate in the presence of the accused. S. 509 of the Criminal Procedure Code does not enact that a deposition of a Surgeon shall be taken and attested by the Magistrate in the presence of the accused. What it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the

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deposition, make it apparent that he has done so. The second document, to which I have already referred, affords a good example of the danger in the criminal case, involving the life of an accused, of making any such presumption as that which I was asked to make in the case of *Queen-Empress* v. *Riding* (1). The file in this case will be returned under seal to the Sessions Judge of Agra, and he will be requested to enquire into the origin of these two documents, and when and by whom they were signed, and when and by whom the alteration in that which is in English was made, and report to this Court accordingly.

TYRRELL, J.—I entirely concur in the dismissal of this appeal and in directing the sentence to be carried out, and I also concur with what has been said by the learned Chief Justice in respect of the deposition of Dr. Hilson, and I fully adopt the ruling of the learned Chief Justice in *Queen-Empress* v. *Riding* (1) and his remarks on the same subject which have been made in the present case.

APPELLATE CIVIL.

1888
January 4.

Before Mr. Justice Mahmood.

DAMODAR DAS AND ANOTHER (DECREE-HOLDERS) *v.* BUDH KUAR AND OTHERS (JUDGMENT-DEBTORS).*

Costs—Mortgage—Decree for foreclosure—Order absolute for foreclosure—Mortgagee obtaining possession—Subsequent application by mortgagee to execute order for costs—Civil Procedure Code, s. 220—*Act IV of* 1882 (*Transfer of Property Act*), *ss.* 86, 87, 94.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs.

Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein* v. *Jusoda* (2) referred to.

THE appellants in this case obtained a decree for foreclosure against the respondents on the 9th September, 1886, and it was

* First Appeal No. 187 of 1887 from an order of Maulvi Mohamed Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 27th May, 1887.

(1) I. L. R., 9 All. 720. (2) I. L. R., 14 Calc. 185.