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HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR.

For the reasons already stated, I am of opinion that the decree appealed against should be set aside, and that the first appeal in this case should be reinstated on the file of pending appeals, and should be heard and decided according to law, and that the costs of this application and of the appeal to us should abide the result of the determination of the first appeal.

STRAIGHT, J.—I agree.

BRODHURST, J.—I concur.

APPELLATE CRIMINAL.

1888
October 24.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* LAL SAHAI.

Evidence—Witnesses—Competency of persons of tender years—Act I of 1872 *(Evidence Act), s.* 118—*Judicial oath or affirmation—Act X of* 1873 *(Oaths Act), ss.* 6, 13—*Omission to take evidence on oath or affirmation.*

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.

Having regard to the language of the Oaths Act (X of 1873) a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require. *Queen-Empress* v. *Maru* (1) referred to.

In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation,

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Held that there was nothing in the law to sanction this procedure on the part of the Judge.

The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred.

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

The appellant was not represented.

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

STRAIGHT, J.—This is an appeal from a capital conviction of the Sessions Judge of Cawnpore, and the case also comes before us for confirmation of the sentence of death passed upon the appellant under the provisions of the statute. The appellant was charged with having, upon the 25th July, 1888, at a village called Garahya, in the Cawnpore district, murdered Musammat Mathuria, his wife. The committing Magistrate in sending the case for trial, among the other witnesses whose depositions had been taken, recorded the deposition of a boy of the name of Churia, the son of the appellant, and his evidence, if true, was of the most vital importance to the case for the prosecution, establishing as it did the presence of the appellant upon the scene of the murder immediately after it had been committed, and the use of an expression by the appellant towards the boy which was consistent only with the notion that the person who made use of it was the perpetrator of the crime. When the case came before the learned Sessions Judge, the boy Churia was called, and it was recorded by the Sessions Judge with regard to him that he was the son of Lal Sahai, that his age was twelve, and then the learned Judge's record goes on to say that, without administering any oath, he asked him some questions, to which he answered as follows:—"I worship Debi. I understand the difference between truth and falsehood. I don't know the consequences here or hereafter of telling lies, but I will tell the truth," and then the learned Judge records, "No oath is administered to this child." Despite this circumstance therefore, and though the learned Judge intentionally omitted either to swear or affirm the child, he proceeded to take from him a lengthened statement as a witness. In my

opinion there is nothing in the law to sanction this procedure on the part of the learned Sessions Judge. Either a person is or is not made a witness: if he is made a witness, then the law of this country requires that he should be either sworn or affirmed. The competency of such person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn nor affirmed; the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed and has given his evidence as a witness. As to the competency of witnesses, that is specifically and in terms declared by s. 118 of the Evidence Act, and I find in that section no direction or intimation to a Court which has to deal with the question whether a person should or should not be examined, that it is to enter upon inquiries as to his religious belief or open up such a field of speculation as is involved in the query, "What will be the consequences here or hereafter if you will not tell the truth?" What I take the law to say is, and a very sound and sensible law I hold it to be, that a Court is to ascertain in the best way it can whether, from the amount of intellectual capacity and understanding of a young or old person, that person is able to give a rational and intelligent account of what he has seen, or heard, or done on a particular occasion, and if the Court is satisfied that a child of twelve years or an old man or woman of very advanced age can satisfy those requirements, the competency of the witness is established. I am very clearly of opinion that having regard to the language of the Oaths Act, neither a Judge nor a Magistrate has any option when once he has elected to take the statements of a person as evidence but to administer either the oath or affirmation to such person as the case may require, and I think it well that this should be understood by such tribunals in these Provinces, in order that they in future may guard against a repetition of the delay and inconvenience that has been caused by the learned Judge's defect of procedure in the present case. I need only further remark in this connection that it might happen that a very grave miscarriage of justice should occur in consequence of the omission of which I have spoken. In a former case involving the same question I made reference to a learned

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ruling of my brother Mahmood in *Queen-Empress* v. *Maru* (1), and my brother Tyrrell and myself having that ruling present to our minds, thought it desirable and proper in a case of the gravity of the present case to see that what had been omitted to be done by the learned Judge in regard to the lad Churia was supplied in this Court. Consequently we gave directions for the convict Lal Sahai to be brought before us, and directed the attendance of the boy Churia in order that the latter might, after we had satisfied ourselves of his competency to dispose, be put either on oath or affirmation and examined as to his account of the proceedings that took place upon the night on which his mother was most undoubtedly murdered. I was most thoroughly satisfied by his answers to the preliminary questions that were put to the lad by my brother Tyrrell that he was a perfectly intelligent creature; that he was quite capable of giving thoroughly rational answers which, by the way, his reply to my examination of him through the interpreter abundantly showed; and further, when he gave his evidence, that he told a true and untutored story of what actually transpired upon the night of his mother's death. It was strikingly noticeable that instead of trying to avoid giving direct answers to my questions as an Indian witness would who had had a tale taught him to tell, he carefully waited to hear what my questions were, and when he did not understand them asked to have them explained to him. I may add that I took special pains in conducting his examination, to avoid, as far as possible, putting the questions to him in a shape that would, in any way, suggest his answers or refresh his memory as to what he had said on former occasions. I have heard and considered the whole of his evidence with very great attention and anxiety, and I am convinced that the little lad is telling the absolute and entire truth, and that when he spoke as to the appellant being the person who was "flying" from the shed immediately after the murder, and said that he screamed out and the appellant used the expression he described, he stated the truth. His evidence is corroborated by the evidence of his two uncles Manohar and Himatia, and I do not for one moment believe that these two men have deliberately united

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in a conspiracy, not only between themselves, but with the police for the purpose of procuring the conviction and execution of an innocent man for their sister's murder. Whatever may have been the motive which led the unfortunate deceased to go from her old house at Lalgaon to her brother's house to Garahya, I cannot pretend to say, for I have no reliable information before me upon the subject. But that the appellant followed her and that he was constantly endeavouring to get her to go back to Lalgaon is a matter about which I entertain no doubt, or that on her refusal to do so he resolved to put her out of the way and did so. The murder was a very cruel and cowardly one perpetrated upon a sleeping and defenceless woman, and there are no circumstances of extenuation whatever which would justify me in mitigating the extreme penalty which the learned Judge, with whom the assessors agreed in convicting, passed upon the appellant. The appeal is dismissed, the sentence confirmed, and I direct that it be carried into execution, and I further direct that the appellant be taken back to the jail from which he came for the purpose of the sentence being carried out.

TYRRELL, J.—I concur.

Appeal dismissed and sentence confirmed.

FULL BENCH.

1888
November 15.

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

SUKH LAL (DEFENDANT) *v.* BHIKHI (PLAINTIFF).*

Civil Procedure Code, ss. 13, 373—*Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata.*

A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another