

1900
 SHEONABAIN
 v.
 CHUNNI
 LAL.

Appellate Court, we think it follows that the Court mentioned in the last paragraph is the same Court, and that therefore the application for enlargement of the time fixed by the decree for payment should have been made to that Court and not to this. On this preliminary ground, therefore, without expressing any opinion as to the merits of the application, the application must be dismissed with costs.

Application dismissed.

1900
 November 16.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS v. RAM SEWAK AND ANOTHER.*

Act No. I of 1872 (Indian Evidence Act), section 118—Evidence—Competency of witness of tender years.

In this case a Sessions Judge purposely refrained from examining a small boy, who must, under the circumstances, have been an eye-witness to a murder. On appeal the High Court observed:—"In our opinion the learned Judge, specially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years."

The facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. Malcolmson*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and AIKMAN, JJ.—This case has been submitted by the Sessions Court of Benares for confirmation of sentences of death passed on Ram Sewak and Bhagwan Das. Both the convicts have appealed, and their appeals are before us. The learned Sessions Judge of Benares in his judgment has set out a past history of the relations between the parties which we need not reproduce. In brief, it amounted to this, that the deceased Sheonandan, who had begun by lending a small sum of money to Ram Sewak, appellant, had in due time sued out the bond for more than double the original debt. He had then proceeded to take out execution of the decree which he obtained against Ram Sewak

* Criminal Appeal No. 1068 of 1900.

and Ram Newaz, who had gone surety for Ram Sewak. The property of Ram Sewak had been attached, objections lodged against the attachment disallowed and the property sold for a small sum. After a year Sheonandan had begun to take further steps, and he again applied for attachment and sale of the movable property of Ram Sewak. Bhagwan Das, Ram Sewak's brother, made objections that the property was his, and the 1st September was the date fixed for hearing the objections. The objection of Bhagwan Das was allowed and deceased ordered to pay costs. Both parties were making their way back to the village, and, apparently talking over the case, began to abuse one another. There is evidence that Ram Sewak said in the course of the mutual altercation that if he was sent to jail by Sheonandan, he would take Sheonandan's life and cut off his hands and legs. That same night at midnight, or shortly after, Sheonandan, who had gone out to watch over his field, was murdered. Two witnesses have come forward, who say that they were eye-witnesses of the murder. They are positive that Ram Sewak was the man who dealt the blows which caused the death of Sheonandan; they also say Bhagwan Das was present, and actually assisting by holding down the deceased while the blows were inflicted. The evidence of these witnesses has been believed by both the learned Judge and the assessors. We have heard all that the learned counsel could say in criticism of the evidence, and we are not prepared to differ from the view taken of it by the Court below. Moreover, there is further evidence, *viz.*, that of Deonandan, brother of the deceased, who, early the following morning, went to the *machan*, where he found his brother lying dead with two wounds on his neck and head; he corroborates the evidence as to what had been said the evening previously. He does not so far appear to press the case, for while he says, that being that night in his field he saw five or six men whom he took to be thieves, he does not pretend to identify these men, or to say that either Ram Sewak or Bhagwan Das was amongst them. Apparently it was he who sent the woman Jamni to make the report at the Police Station. Jamni in her report charges Ram Sewak, Bhagwan Das and others with the murder of her son. We must say it is unfortunate that the learned Judge declined to examine the boy Sarju. The reason he

1900

QUEEN-
EMPRESS
v.
RAM
SEWAK.

1900

QUEEN-
EMPRESS
v.
RAM
SEWAK.

gives is that he considers the boy cannot understand a solemn affirmation, and is too young to be examined. In the judgment he adds that the boy was much too small in his opinion "to enter the box; he is a very small boy." Sarju was a most important witness; he was lying on the *machan* beside his father at the time he was murdered. There is evidence which points to his having seen, as indeed he must have seen, what took place, and as to his having identified one, at any rate, of the murderers. In our opinion the learned Judge, especially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of section 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years. In spite of the boy's smallness he may have been a lad who could both understand questions and give rational answers to them; if this was the case he most certainly ought to have been examined. The learned counsel for the accused having pointed to the relationship which existed between the parties, asks us to view the evidence given by the witnesses with suspicion. We have considered this, but we find the evidence on the face of it clear and full in detail, and as regards its matter, both possible and probable. It clearly establishes a case of wilful murder against both the convicts. As regards Ram Sewak, who is the elder of the two brothers, we find that it was he who struck the blows which caused death; the younger brother, Bhagwan Das, was undoubtedly abetting him, and is liable to the same punishment; but taking into account all that had happened previously, and the fact that he was probably acting under his brother's influence, and that he did not himself inflict any blow, we think we may in this case give effect to the plea that the sentence is too severe. We dismiss the appeal of Ram Sewak, and in his case confirm the conviction and sentence, and direct that the latter be carried out according to law. We allow Bhagwan Das' appeal so far that we set aside the sentence of death, and in lieu thereof we order that Bhagwan Das suffer transportation for life with effect from the 26th of September, 1900.