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AIKMAN, J.—I am of opinion that the decision of the Courts below is right. In my judgment the case is one clearly falling within the purview of section 244, clause (c) of the Code of Civil Procedure. I doubt very much whether it is open to the appellant to put forward the plea which he now urges. The respondent, Randhir Singh, brought a regular suit to have the sale set aside. A plea was taken by the present appellant, that a regular suit would not lie, and that Randhir Singh's remedy was an application under section 244. The Subordinate Judge sustained the appellant's objection and dismissed the suit. Now, when Randhir Singh makes an application under section 244, the appellant turns round and says, 'You cannot apply under section 244, you must bring a regular suit.' In my opinion this issue was decided as between the parties in the previous litigation, and I am of opinion that the appellant cannot go behind that decision. To allow him to do so would, to use Lord Bowen's expression in *Gandy* v. *Gandy* (1), be "playing fast-and-loose with justice." I concur in taking that the appeal should be dismissed.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

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May 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR *v.* DWARKA KURMI.*

Criminal Procedure Code, section 288—*Evidence—Statements before committing Magistrate retracted before Court of Session.*

In a capital case certain witnesses, who had stated before the committing Magistrate that they had seen the accused striking the deceased, withdrew their statements before the Court of Session and gave evidence exculpating the accused. The Sessions Judge, considering the evidence given before him by these witnesses to be untrue and acting under section 288 of the Code of Criminal Procedure, admitted in evidence the statements of these witnesses made before the committing Magistrate.

Held that such statements were rightly admitted and when admitted were on the same footing as the other evidence on the record. *Queen-Empress*

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* Criminal Appeal No. 290 of 1906.

(1) (1885) L.R., 30 Ch. D., 57.

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v. *Dhan Sahai* (1), *Queen-Empress* v. *Jeochi* (2), *Queen-Empress* v. *Jawahir* (3), *Queen-Empress* v. *Nirmal Das* (4) and *Umar* v. *Empress* (5) referred to.

THE facts of the case are fully stated in the judgment of Banerji, J.

Messrs. *A. E. Howard* and *A. H. C. Hamilton*, for the appellant.

The Officiating Government Advocate (Mr *W. Wallach*) for the Crown.

BANERJI, J.—This is an appeal by Dwarka Kurmi, who gave his age as sixteen, but who, according to the learned Sessions Judge, was at least twenty years old, against a conviction and sentence of death for the murder of his uncle, Nand Lal.

Dwarka is the son of one Raghubar, and lived in the same house with his grandfather, Tika Ram and his uncle, Nand Lal. About mid-day on the 25th January last Nand Lal was killed by some one in his house. The medical evidence shows that a series of blows had been delivered on the back of the neck and that his head was practically separated from the trunk. A report was made to the Police the same day by an ex-chaukidar of the village, in which it was stated that Dwarka had murdered the deceased. When the Sub-Inspector came to the spot shortly afterwards, he found Dwarka in the custody of Debi Dayal chaukidar. Debi Dayal has sworn that he saw Dwarka strike Nand Lal on the neck with a *gandasa* whilst Nand Lal was eating his food, that on seeing him Dwarka threw down the *gandasa* and ran away; that the witness pursued and caught him, and that he sent the ex-chaukidar to the Police to make a report. The accused in his statement in the Court of Session admitted that the chaukidar, Debi Dayal, had arrested him on the day of the murder.

Lachman, another witness, who was working close by at the house of Misri, also swore that he saw Dwarka strike Nand Lal with a *gandasa* on the neck; that on the arrival of Debi Dayal, chaukidar, Dwarka threw down the *gandasa* and fled, and that Debi Dayal ran after and brought him back. The

(1) (1885) I. L. R., 7 All., 862.
(2) (1898) I. L. R., 21 All., 111.
(3) Weekly Notes, 1888, p. 356.
(4) (1900) I. L. R., 22 All., 445.
(5) (1887) 22 Panj. Rec., Cr. J., 132.

witness says he was at a distance of ten paces from the spot of the murder.

The Sub-Inspector found traces of blood in the cook-room where the murder is said to have been committed, and the same day he recorded the statements of some of the women who lived in the same house with Nand Lal and Dwarka.

Dwarka made a confession on the 27th of January, in which he stated that he had aimed a blow at the neck of his uncle, but that he was suffering from insanity at the time and did not know that he had murdered his uncle. He gives as the reason for the attack that the deceased had abused him for having dug up potatoes from the field cultivated by both of them. He says that he was in his senses when he was being abused, but that when he went inside he got an attack of insanity and felt that the deceased was still abusing him, that he was in his senses when he saw the neck of the deceased and aimed a blow at it with the *gandasa*, but that after this all was darkness and he could see nothing. With reference to this allegation of insanity, it may be observed that there is no evidence to support it, but on the contrary the wife of the deceased and Musammat Udeti, both of whom in the Court of Session retracted the statements made by them before the committing Magistrate, deposed that Dwarka was not liable to fits of insanity. He did not adhere to this allegation when the first statement made by him was subsequently retracted in the Court of the committing Magistrate and also in the Court of Session. In the Court of the Magistrate Musammat Bilasi, the wife of Nand Lal, Musammat Udeti, a cousin, and Musammat Bhagwana, another relative of Dwarka, stated that Dwarka had struck Nand Lal several blows on the neck with a *gandasa* whilst he was taking his mid-day meal. In the Court of Session, however, they withdrew these statements, and said that they did not see Dwarka commit the murder, and gave evidence exculpating him. The learned Sessions Judge considered that the statements made before him by these three witnesses were untrue, and under section 288 of the Code of Criminal Procedure he admitted in evidence the statements made by them before the committing Magistrate. Mr. *Howard* on behalf of the appellant contends that these statements were wrongly admitted, and in support of his contention

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refers to the ruling of Straight, J., in *Queen-Empress* v. *Dhan Sahai* (1) and to my judgment in *Queeen-Empress* v. *Jeochi* (2).

Having regard to the clear language of section 288 it cannot be held that these statements could not be admitted in evidence under the section. In the case of *Queen-Empress* v. *Jeochi* I did not intend to hold that such depositions were wholly inadmissible. What I intended to lay down and did lay down was, as the head-note correctly states, that a Sessions Court would not be justified in basing a conviction solely on statements made before another tribunal and retracted before itself. I do not think that in *Queen-Empress* v. *Dhan Sahai* (1) Mr. Justice Straight intended to lay down a different rule. The words "at any rate the Judge was bound to put to the witness, &c.," were clearly intended to qualify what he had said immediately before. I think in this case the learned Sessions Judge acted rightly in treating as evidence in the trial before him the evidence given before the committing Magistrate by the three witnesses named above. Apart from this, I think there is sufficient evidence on the record to prove that it was Dwarka who committed the murder. There is no reason to disbelieve the statements of Debi Dayal and Lachman. Dwarka was, as I have already stated, named as the murderer in the first information given to the Police. He was arrested and detained in custody and there is not the slightest evidence to show that any other person committed the murder, or had any motive for doing so. In my judgment Dwarka has been rightly convicted, and having regard to the cruel nature of the crime I think he has been rightly sentenced. For these reasons I would dismiss the appeal.

AIKMAN, J.—I am also of opinion that this appeal must be dismissed. I consider that it is proved beyond any possibility of doubt that it was the appellant, Dwarka who murdered Nand Lal, about noon on the 25th of January last, by striking him repeated blows with a *gandasa* on the neck. I have nothing to add to the convincing judgment of the learned Sessions Judge.

I wish to say a few words in regard to the objection taken by the appellant's learned counsel to the admission of the evidence which was brought on the record by the lower Court under the

(1) (1885) I. L. R., 7 All., 862. (2) (1893) I. L. R., 21 All., 111.

provisions of section 288 of the Code of Criminal Procedure. The learned Sessions Judge brought on the record the whole of the depositions made by the three witnesses in the presence of the accused before the committing Magistrate.

In the case of *Queen-Empress* v. *Dhan Sahai* (1) Mr. Justice Straight referring to this section says :—"That section was never intended to be used so as to enable a Court trying a cause to take a witness' deposition bodily from a Magistrate's record, as the Judge has done here, and to treat it as evidence before itself." With all deference to the learned Judge, I am of opinion that this dictum is clearly opposed to the plain language of the section, which says :—"The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case." I entirely agree with what was said by Edge, C.J., in *Empress* v. *Jawahir* (2), as to the preliminaries which should be adopted and precautions which should be taken before the deposition of a witness taken before a committing Magistrate is treated as evidence at the trial. For the appellant reliance was also placed on what was said in the case of *Queen-Empress* v. *Nirmal Das* (3). The learned Judges there say :—"The terms indeed of section 288 of the Code of Criminal Procedure, which render the evidence of a witness taken before a committing Magistrate capable of being treated as evidence in the discretion of the presiding Judge, are couched in the widest possible language; but we entertain the strongest opinion, in common with Mr. Justice Straight, that it never was the intention of the Legislature that the substance of such a statement before a Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it." What the learned Judges in that case meant by "substantial evidence" I am unable to understand. As to this I would refer to what was said by Plowden, J., in *Umar* v. *Empress* (4). Referring to section 288 the learned Judge says :—"That seems to me clearly to enable the Judge in his discretion to treat the deposition containing such evidence, when

(1) (1885) I. L. R., 7 All., 862.
(2) Weekly Notes, 1888, p. 356.
(3) (1900) I. L. R., 22 All., 445.
(4) (1887) 22, Panj. Rec., Cr. J., 132.

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duly taken, as proved, and also to treat the evidence in the deposition, as if it had been given before him instead of before the committing Magistrate." The learned Judge goes on to say: "But I am wholly unable to find anything in this section which prescribes the value or weight to be attached to the evidence this admitted." . . . . "Once admitted it is on the same footing with all other evidence in the case, that is to say, it is to be considered by the jury or by the assessors and the Judge, according to the nature of the trial, as part of the materials upon which the verdict or a finding is to be given." . . . . . . "Its value is a question in the particular case for the jury or for the assessors, subject to the directions of the Judge in summing up, or for the Judge in cases where he is a Judge of fact." . . . . . . "Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury or assessors, or for the Judge, as the case may be, but they are in no way affected by this section. They are also very important questions for the superior Court (when the verdict or finding is not final); but then also they are not affected by section 288." With these observations as to the scope of section 288 I am in full accord. I am glad to have had an opportunity of expressing my dissent from the dictum in *Empress* v. *Dhan Sahai* (1), referred to, as to the correctness of which I have for many years entertained the strongest doubt.

BY THE COURT.—We dismiss the appeal, affirm the conviction and sentence, and direct that the sentence be carried into execution according to law.

(1) (1885) I. L. R., 7 All., 862.