

APPELLATE CRIMINAL.

1919
July, 7.

Before Mr. Justice Figgott.

EMPEROR v. KADHE MAL.*

Act No. I of 1872 (Indian Evidence Act), section 33—Evidence—Admissibility of statement made by a witness since deceased.

A statement made by a witness in a civil suit concerning the authenticity of a document before the court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document, the witness having since died; but such a statement cannot be treated as evidence against another witness in the same civil suit accused of abetment of the offence charged against the party, and of perjury.

In a suit for money the defendant Debi Singh produced in proof of payment thereof, a receipt purporting to have been signed by the plaintiff's brother Kishan Singh. Kadhe Mal, who purported to be an attesting witness to the receipt, was also examined as a witness on behalf of the defendant, and he deposed in support of the receipt. Kishan Singh was examined on behalf of the plaintiff and he denied having given the receipt and stated that it was a forgery. The court holding the receipt to be a forgery, took action under section 476 of the Code of Criminal Procedure against Debi Singh and Kadhe Mal. They were tried by the Court of Sessions, Debi Singh on a charge under sections 471/467, Indian Penal Code, and Kadhe Mal under sections 467/114 and 193, Indian Penal Code. There were two separate trials, as required by law, but as a matter of fact they both proceeded upon the same evidence. Kishan Singh having died before the trials commenced, the statement which he had made in the civil suit was admitted in evidence against the accused; and this was the principal item of evidence on behalf of the prosecution. Each of the accused was convicted, and each appealed to the High Court. Both the appeals were heard by FIGGOTT, J., who dismissed Debi Singh's appeal, holding that the statement of Kishan Singh had been rightly admitted in evidence, under section 33 of the Evidence Act, against Debi Singh.

Munshi Panna Lal, (with him Babu Satya Chandra Mukerji), for the appellant, contended that the statement made by Kishan Singh in the Civil Court had been wrongly admitted

* Criminal Appeal No. 518 of 1919, from an order of Jagat Narain, Sessions Judge of Aligarh, dated the 30th of April, 1919.

1919

EMPEROR
v.
KADHE MAL.

in evidence as against Kadhe Mal. Kadhe Mal had not been a party to the civil suit; he had only been called as a witness therein. And, of course, he had not had the right and opportunity to cross-examine Kishan Singh when the latter made his statement in the civil suit. Thus, the requirements of the first two clauses of the proviso to section 33 of the Evidence Act not being complied with, the statement in question was not admissible against Kadhe Mal at the trial. Excluding that statement, the rest of the evidence was not sufficient to support the conviction. In dealing with Kadhe Mal's case the Sessions Judge had erroneously relied on his finding in Debi Singh's case that the receipt was a forged document.

The Officiating Government Pleader (Babu *Sital Prasad Ghosh*), for the Crown, submitted that apart from the statement of Kishan Singh, if the Court was satisfied as to the guilt of the appellant, there was no reason why the conviction should not be upheld. The Sessions Judge had not treated Kadhe Mal's case as concluded by his finding in Debi Singh's case but had come to a finding on the whole of the evidence.

PIGGOTT, J:—This appeal is closely connected with another which I have just disposed of, but the two cases differ in one essential point. In a certain civil suit in which one Debi Singh was being sued as a defendant for the recovery of a certain sum of money, Debi Singh produced in evidence a receipt purporting to have been given him by one Kishan Singh. The Civil Court decided against the genuineness of that receipt, and eventually Debi Singh was put on his trial for having produced in evidence a forged document, knowing it to be forged, and Kadhe Mal was separately placed on his trial for abetment of the forgery and for having given false evidence before the Civil Court. The two accused persons were tried separately, as required by the law, but in reality there had been no separate trial. The learned Sessions Judge commences his judgment against Kadhe Mal with the remark that the receipt in question has already been found to be a forged document in the trial of Debi Singh. He does not of course mean to say that this fact is conclusive against Kadhe Mal; but he has assumed that the evidence against Kadhe Mal is the same as that against Debi Singh and that the same court must

1919

EMPEROR
v.
KADHE MAL.

necessarily come to the same finding in the two cases. Now Kishan Singh, whose signature appears on the receipt, had died before criminal proceedings were taken. The deposition which he had made at the civil trial was admissible in evidence against Debi Singh, but was not admissible against Kadhe Mal. If both the cases had been tried with the aid of jury, and Kadhe Mal's case had come before a different jury, it would have been the duty of the court to exclude from evidence the statement which Kishan Singh had made at the trial in the civil suit, and the jury would have been asked to return a verdict as against Kadhe Mal on the evidence available after the exclusion of that deposition. In my opinion no jury could have returned a verdict of guilty without having before them the sworn testimony of Kishan Singh. As I have pointed out in my judgment on Debi Singh's appeal, this sworn testimony is the decisive feature in the case. The rest of the prosecution evidence amounts to circumstantial evidence corroborating Kishan Singh's statement and warranting the court in believing him to have spoken the truth. It is not, in my opinion, evidence such as to justify affirmatively the finding that the receipt in question is a forged document. It may be that Kadhe Mal has been unduly fortunate in the circumstances of his trial, but the law requires him to be tried separately from Debi Singh, and I cannot overlook the fact that the evidence against the two men is by no means the same. I accept the appeal of Kadhe Mal, set aside the conviction and sentence against him and direct that he be released.

Conviction quashed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

IN THE MATTER OF THE PETITION OF KADHORI AND OTHERS*.

Contempt of Court—Order passed by Munsif to show cause why proceedings in relation to an alleged contempt should not be taken—Revision—Civil Procedure Code (1908), section 115—Government of India Act, 1915, section 107.

Held that an order passed by a Munsif, calling upon parties to a civil suit to show cause why they should not be proceeded against in respect of an

* Criminal Revision No. 335 of 1919, from an order of Tadjammui Husain, Munsif of Etawah, dated the 21st of May, 1919.

1919
July, 8.