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OFFICIAL LIQUIDATOR, INDIAN STATES BANK v. RUKMINI RANI

If the legislature desires to make such a distinction then it ought to be clearly provided in the Court Fees Act that the written statement in a miscellaneous case shall be liable to stamp duty as an application or petition. Under these circumstances I consider that it is not necessary for the written statements in the present miscellaneous cases to be stamped. Let this finding be returned to the taxing officer.

REVISIONAL CRIMINAL

Before Mr. Justice Bennet

1933
December, 19

EMPEROR *v.* SURAJBALI*

Criminal Procedure Code, section 164—*Previous statements made by witnesses to the police—Time up to which copies thereof can be demanded by the accused—Evidence Act* (*I of* 1872), *sections* 32, 80—*Dying declarations—Mode of proof —Whether the Magistrate recording a dying declaration must be called to prove it—Admissibility in evidence.*

Under section 162 of the Criminal Procedure Code the only use to which previous statements, made to the police, by the witnesses may be put is under section 145 of the Evidence Act to contradict a witness, and for this purpose the attention of the witness must be drawn to the previous statement at the time when he is being examined or cross-examined. That is the time when the application for copies of the previous statements should be made, and the section does not authorise the demanding of such copies after the evidence of the witnesses has closed and there is no longer any use to which such statements can then be put.

Under section 80 of the Evidence Act a dying declaration, which has been recorded by a Magistrate, can be tendered in evidence without the Magistrate who recorded it being called. Section 80 is applicable to depositions and similar statements, which may be proved by the production of the document without any witness being called to prove it.

A dying declaration does amount to "evidence" within the meaning of section 80, although there may not have been any case under inquiry before the Magistrate who recorded it.

*Criminal Revision No. 888 of 1933, from an order of Krishna Das, Second Additional Sessions Judge of Gorakhpur, dated the 2nd of October, 1933.

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EMPEROR v. SURAJ-BALI

Mr. *Kanhaya Lal Misra,* for the applicant.

This application was heard *ex parte.*

BENNET, J.:—These are three applications in revision on behalf of five persons who have been convicted in one trial under section 325 of the Indian Penal Code and sentenced to six months' rigorous imprisonment and Rs.100 fine by a Tahsildar Magistrate. The appeal to the Joint Magistrate was dismissed, and an application in revision to the Sessions Judge has been dismissed. It is now for the fourth time that the matter has been brought before the courts. Many grounds have been argued at considerable length. [The judgment, after discussing some grounds which are not material for the purpose of this report, proceeded to discuss the other grounds as follows.]

The fourth ground of revision was that copies of statements under section 162 of the Criminal Procedure Code were not supplied to the applicants and they were therefore prejudiced in the cross-examination of the prosecution witnesses. The application for such copies was not made until the statements of the prosecution witnesses had been completed and their cross-examination had closed. Under section 162 the only use to which such statements may be put is under section 145 of the Evidence Act to contradict a witness, and for this purpose the attention of the witness must be drawn to the statements, and the time when the application should be made is "when any witness is called for the prosecution". The section does not authorise the granting of such copies after the evidence of the witnesses has closed, and there is no use to which such statements can then be put.

Lengthy argument was made in regard to a dying declaration of the complainant which was recorded by a Magistrate, which was tendered in evidence without the Magistrate who recorded it being called. The opinion of the learned Sessions Judge was that if this evidence was discarded there will still remain sufficient

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evidence on the record to convict the applicants. Three witnesses Narsingh, Baramdeo, and Bandhu gave evidence for the prosecution that they saw all the accused beating the deceased Mahabir Pande with lathis. Learned counsel attempted to show that it was necessary to call the Magistrate who recorded the dying deposition. He has produced no ruling in his favour with the exception of a very old ruling of the Bombay High Court in the case of *Reg.* v. *Fata Adaji* (1). In that case the Government Prosecutor argued that the dying declaration before a Magistrate on solemn affirmation might be admitted without proof under section 80 of the Indian Evidence Act. One of the learned Judges observed: "The Magistrate was not the committing Magistrate, and the prisoners were not present, and had no opportunity of cross-examining the dying man." Now, of these three reasons given, not one reason would be altered if the Magistrate who recorded the dying deposition were called. That Magistrate would not become the committing Magistrate by being called as a witness, nor would the defect of the accused having been absent and not having had an opportunity of cross-examination be in any way removed by the calling of the Magistrate who recorded the dying deposition. Further on the court observed: "The law does not provide that the mere signature of a Magistrate shall be a sufficient authentication of such a document." The only question before the court was whether section 80 does or does not make that provision. The mere declaration that it does not is no reason. Learned counsel also referred to two rulings of the Calcutta High Court, one of which is *Gouridas Namasudra* v. *Emperor* (2) and the other is *Tafiz Pramanik* v. *Emperor* (3). In neither of these cases was there any reference to section 80 of the Evidence Act and, therefore, the rulings cannot be taken as decisions on that section. There are two rulings of this High Court in which this

(1) (1874) 11 Bom. H.C.R., 247. (2) (1908) I.L.R., 36 Cal., 659.
(3) A.I.R., 1930 Cal., 228.

section has been considered and those rulings assume that the section does apply to depositions and similar statements which may be proved by the production of the document without any witness being called to prove it. The first of these rulings is *Queen-Empress* v. *Pohp Singh* (1). In that case there was the deposition of a medical witness which was merely signed by the Magistrate, and the certificate required by section 509 of the Criminal Procedure Code that the deposition was taken and attested by a Magistrate in the presence of the accused was wanting. The prosecution argued that section 80 of the Evidence Act might be held to cover this defect. The court held that the section could not be used for this purpose. The language used on page 178 indicates that the court considered that the section could be used for the purpose of tendering a document without calling evidence to prove it. The next ruling is in the case of *Queen-Empress* v. *Sundar Singh* (2). That was a case where the prosecution tendered a document purporting to be the record of a confession recorded by a Magistrate in Gwalior State. It was held that under section 80 this record was admissible to prove that the confession had been duly made and that it was not necessary to call the Magistrate who recorded the confession. In the case of *Maqbulan* v. *Ahmad Husain* (3) their Lordships of the Privy Council had a case in which a certified copy of the statement of a witness in a previous case was tendered as evidence and their Lordships held on pages 117 and 119 that that statement was admissible to prove the previous statement of the witness without calling any further evidence. Apparently it was held admissible under section 80 of the Evidence Act, as on page 114 it is shown that that was a section to which reference was made by the counsel desiring the document to be accepted. It was held, however, that the description

(1) (1887) I.L.R., 10 All., 174. (2) (1890) I.L.R., 12 All., 595.
(3) (1903) I.L.R., 26 All., 108.

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of the witness given in the heading was not part of the deposition and, therefore, could not be admitted as proved by the mere production of the document. Having regard to these three rulings I am of opinion that it is not shown that the Tahsildar was wrong in accepting the dying declaration of Mahabir as evidence. Another argument which was advanced by learned counsel for the defence was based on the word "evidence" appearing in section 80 of the Evidence Act. He argued that a dying deposition could not come under section 80 because it was not evidence at the time at which it was recorded. For this purpose he referred to the definition of "evidence" in section 3, which in sub-section (1) of the definition says: "All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence." His argument was that there was no case before the Magistrate recording the dying deposition and, therefore, there was no fact under inquiry and there could be no evidence taken by him. But this is an argument which ignores the definition of "court" given in section 3. Under that section a court includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence. The Magistrate who recorded the dying deposition was legally authorised to do so, and the inquiry which he was making was an inquiry directed for the purpose of recording that particular statement. Consequently, in my opinion, the dying deposition does amount to evidence within the meaning of section 80.

No further point was argued. I consider that under the circumstances of the case the accused have received an extremely light punishment. The applications in revision are, therefore, dismissed.