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SOHAN LAL v. MUBARAK ALI KHAN

For the reasons which I have already given it is perfectly clear that Babu Sohan Lal does not fulfil that description and he cannot therefore claim any protection under section 197 of the Criminal Procedure Code. The result therefore is that I reject the references made by the learned Additional Sessions Judge.

Before Mr. Justice Ismail and Mr. Justice Mulla

EMPEROR *v.* QUDRAT AND ANOTHER*

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Criminal Procedure Code, section 289(2)—*No evidence to prove the offence—Direction to jury to return a verdict of not guilty—Jury bound to return such verdict—Evidence Act (I of* 1872), *section* 45—*Medical evidence as to age, value of.*

The direction given by the Judge to the jury, under section 289(2) of the Criminal Procedure Code when he considers that there is no evidence that the accused committed the offence. to return a verdict of not guilty is binding on the jury and must be followed by them, whether they agree with the Judge's view or not, and any other verdict returned by the jury must be set aside.

Where, in a trial under a charge of kidnapping, the doctor's statement as to the age of the girl was an opinion based entirely on such particulars as her height, weight and teeth, which could be observed by any layman, and it did not appear that the doctor brought any scientific knowledge to bear upon his opinion, it was *held* that such opinion did not amount to legal proof of age of the girl.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

Mr. *Madan Mohan Lal,* for the opposite parties.

ISMAIL and MULLA, JJ.:—This is a reference under section 307 of the Criminal Procedure Code by the learned Assistant Sessions Judge of Benares.

Mst. Bhagmania, said to be about 12 or 13 years of age, was living with her father-in-law named Sudaman in village Lachhmangarh. On the 1st of August, 1938, Sudaman found at about 8 or 9 p.m. that Mst. Bhagmania had disappeared from the house in which the

*Criminal Reference No. 908 of 1938.

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family was living. Sudaman searched for the girl, but did not succeed in tracing her. He gave information to Lallan Singh, the zamindar of the village. The next day the sub-inspector of police station Balua happened to visit the village. Lallan Singh informed the sub-inspector of the disappearance of the girl. After some investigation Qudrat accused was summoned, and it is stated that he informed the sub-inspector that the girl would be found at the house of Mst. Rasulan, accused No. 2, in village Dharain. The girl was found outside the house of Mst. Rasulan and was made over to Iqbal Ahmad, the sub-inspector. Qudrat and Rasulan were prosecuted, the former under sections 366 and 376 of the Indian Penal Code and the latter under section 368 of the Indian Penal Code. The case was committed to sessions and was tried with the aid of a jury. Mst. Bhagmania stated how she was enticed away by Qudrat, who, after having sexual intercourse with her, took her to the house of Mst. Rasulan at midnight and left her in custody of Mst. Rasulan. After the examination of the witnesses for the prosecution and the examination of the accused, the learned Assistant Sessions Judge was of the opinion that there was no evidence on the record to prove that the accused had committed the offences with which they were charged. He accordingly directed the jury to return a verdict of not guilty. The jury, however, returned a verdict of guilty by a majority of 3 against 2. The learned Sessions Judge then made this reference under section 307 of the Code, with the recommendation that this Court may set aside the verdict of the jury and may pass an order of acquittal in favour of the accused persons. The first question to be determined is whether the jury were entitled to return the verdict of guilty against the clear direction of the learned Sessions Judge to the contrary. Section 289(2) of the Criminal Procedure Code provides: "If he (accused) says that he does not (mean to adduce evidence), the prosecutor may sum up his case; and, if the court considers that there is no evidence that the

accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict, of not guilty." The expression "direct" leaves no room for doubt that the intention of the legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. This interpretation finds support from illustration (*a*) to section 299 of the Code: " . . . . It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it." This illustration apparently refers to the direction given by the learned Judge on points of law; but the same expression is used in section 289 of the Code, and in our opinion it follows that the direction of the Judge that there is no evidence that the accused committed an offence is equally binding on the jury and must be followed by them. In other words, the question of absence of evidence is treated as a question of law and not a mere question of fact. Having regard to the clear language of the section we have no hesitation in holding that the verdict of the jury in the present case cannot be accepted.

The next question for consideration is whether the learned Sessions Judge was justified in holding that there was no evidence on the record to prove that the accused had committed the offence. In order to prove the charge of kidnapping it was incumbent on the prosecution to prove that Mst. Bhagmania was under 16 years of age. Similarly to prove the charge under section 376 the prosecution was bound to prove that Mst. Bhagmania was below the age of 14, so that her consent to have sexual intercourse with Qudrat may be treated as no consent in law. Mst. Bhagmania herself gave her age as 12 or 13. It is manifest that Mst. Bhagmania herself had no direct knowledge about her age. It is also manifest that she did not derive this information

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from anyone else, otherwise we would expect that she would give a more definite figure. In her statement she does not say whether she derived this knowledge from her mother or father. That being so, we must disregard the statement of Mst. Bhagmania with regard to her age. Prosecution witness Sudaman clearly states that he did not know where and when Bhagmania was born, nor did he know Bhagmania from before her marriage. There is no other evidence on the record proving the age of Mst. Bhagmania, except the statement of the Civil Surgeon. In the opinion of the Civil Surgeon, Mst. Bhagmania's age was about 13. It appears that the doctor based his opinion on the particulars given in his report with regard to height, weight, etc. The learned Assistant Sessions Judge is of opinion that the medical evidence does not amount to legal proof of the age of Mst. Bhagmania. Under section 45 of the Indian Evidence Act, "When the court has to form an opinion upon a point of . . . science . . . the opinions upon that point of persons specially skilled in such . . . science . . . are relevant facts. Such persons are called experts." From the statement of the Civil Surgeon it does not appear that he brought any scientific knowledge to bear upon his opinion. The indications given by the doctor could be observed by a layman. It is true that a doctor is in a better position to form an opinion about the age of a person than a layman, but the statement of a doctor is no more than an opinion. This question has been considered in several cases. We need only cite the observations of their Lordships of the Judicial Committee in the case of *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1). While considering the doctor's certificate on the question of age their Lordships observed as follows: "Dr. Bright, on examination, says that he formed the opinion that the appellant was 21, judging by his teeth, his appearance and his voice. In their Lordships' view such a certificate is worthless. It is in truth not a certificate, but only an assertion of

(1) (1916) 43 I.A. 256.

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opinion . . . Proof on the subject is not advanced by such documents." From the report of the Civil Surgeon in the present case it would appear that he relied entirely on certain physical peculiarities, such as teeth, etc. In our opinion, the learned Assistant Sessions Judge was right in holding that there was no legal proof of the age of Mst. Bhagmania. That being so, the learned Assistant Sessions Judge was fully entitled under section 289 of the Criminal Procedure Code to direct the jury to return a verdict of not guilty which the jury were bound to follow. For the reasons given above we accept the reference, set aside the verdict of the jury and acquit Qudrat and Mst. Rasulan of the offences with which they were charged.

Before Mr. Justice Mulla

EMPEROR *v.* MOTI LAL*

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Municipalities Act (Local Act II of 1916), sections 307, 318, 321—Notice to remove constructions—Failure to comply—Notice can not be called in question in criminal court—Notice issued by Executive Officer—Appeal to Board—No second appeal lies to District Magistrate from the appellate order of the Board.

The criminal court trying a person under section 307 of the Municipalities Act, for disobedience to a notice to remove certain constructions, can never be concerned with the question as to whether the notice issued was a regular and valid notice or otherwise, and it makes no difference whether the person did or did not avail himself of the right to appeal against the notice to the District Magistrate. The procedure for challenging the validity of a notice is specifically laid down in section 318 of the Municipalities Act, and, whether that procedure has been followed or not, in no case can the validity of the notice be raised in any form before the criminal court.

The expression "any order or direction made by a Board", in section 318 of the Municipalities Act, can not refer to an order passed by the Board upon appeal from a notice issued by the Executive Officer for the removal of a construction. The Municipalities Act does not provide for a second appeal to

*Criminal Revision No. 175 of 1939, from an order of V. Bhargava, Sessions Judge of Bulandshahr, dated the 30th of November, 1938.