1891

FEBASAT v. QUEEN-EMPRESS.

appellants will therefore undergo rigorous imprisonment for a term of two years only, instead of five.

As regards the other appellants, specific acts of violence have been proved against them, and it may be presumed therefore that they were ringleaders or at any rate active participators in the riot. We see no sufficient reason therefore to reduce the sentence under section 148 in their case, but the sentence under section 152 will be reversed in the case of Ismail and Manir Khan. These appellants have also been sentenced to two years' imprisonment under section 332, but having regard to the fact that they have already been sentenced under section 148, we do not think that the sentence under section 332 should exceed that provided by section 323. We accordingly reduce the punishment under section 332 to one year. The result is that these two appellants will suffer four years' imprisonment, instead of seven years.

The appellant Shairu has been sentenced to five years under section 333 in addition to three years under section 148. Looking to the nature of the injuries that Superintendent Robertson is proved to have received, we are of opinion that an additional sentence of two years under section 333 will meet the ends of justice. His aggregate sentence therefore will be reduced from eight years to five years.

Appeal allowed and sentences modified.

H. T. H.

ORIGINAL CRIMINAL.

Before Mr. Justice Wilson.

QUEEN-EMPRESS *v.* A. M. JACOB.

1891 *December 7.*

Commission—Criminal Procedure Code (Act X of 1882), ss. 503, 507—Evidence Act (I of 1872), s. 33—Practice.

Evidence taken under a commission issuing from the Court of the Chief Presidency Magistrate during the course of an enquiry before him cannot be used in evidence at the trial before the High Court under section 507 of the Criminal Procedure Code.

Held further, that on the facts before the High Court it was also inadmissible under section 33 of the Evidence Act.

PENDING the hearing of certain proceedings in the Court of the Chief Magistrate of Calcutta in September 1891 taken against the

1891

QUEEN-EMPRESS v. A. M. JACOB.

accused for alleged criminal breaches of trust, the prosecution applied to the Magistrate for a commission to examine the complainant, the Nizam of Hyderabad. The accused made no objection to the commission issuing, and it issued accordingly. The evidence of the Nizam was taken at Hyderabad in the presence of counsel for both sides; and the commission was duly returned to the Magistrate's Court, and was read as evidence in the case on the 22nd October 1891. The accused was on that day committed to the Sessions. At the trial before the Sessions Court on the 7th December the prosecution sought to read the evidence of the Nizam taken under this commission which had issued from the Court of the Chief Presidency Magistrate. An affidavit of one Hormusjee Nusserwarjee, a vakeel of Hyderabad, was read on behalf of the prosecution. The affidavit ran as follows:—"That I have been for the past three years and upwards the legal adviser to the Government of His Highness the Nizam of Hyderabad. That I know and am well acquainted with all the facts and circumstances of the transactions in respect of which criminal proceedings have been instituted against Mr. Alexander Malcolm Biery Sabanjee, *alias* Alexander Malcolm Jacob, on the prosecution of His Highness the Nizam, and in respect of which he now stands committed for trial before this Hon'ble Court during the present Session.

"That I am well acquainted with the manner in which the affairs of the State of Hyderabad are conducted, and have to advise the Government of His Highness the Nizam on legal matters connected with that State, and am also often consulted on administrative and other matters of the said State connected with such legal matters.

"That His Highness the Nizam seldom leaves his dominions, and being the absolute ruler thereof, if he leaves, he takes with him his Ministers and other high officers of State, in order that the affairs thereof may not be completely paralysed by his absence; and that if he had to leave Hyderabad for Calcutta to give evidence in this case, His Highness's Ministers and all the Secretaries of State would have to accompany him at enormous cost and expense, and the administration of his State would be seriously impeded and disturbed.

1891

QUEEN-EMPRESS v. A. M. JACOB.

"That the evidence of His Highness the Nizam as a witness for the prosecution in this case being absolutely necessary for the ends of justice, whilst his provisional attendance at Calcutta could not be procured without an amount of delay and enormous expense, which under the circumstances of the case would be unreasonable, the Presidency Magistrate, who enquired into and committed this case to this Hon'ble Court, granted a commission directed to His Highness the Nizam's Resident at Hyderabad, under section 503 of the Criminal Procedure Code, after he had expressed his intention to commit the accused for trial to this Hon'ble Court, for the examination of His Highness the Nizam as a witness on behalf of the prosecution, which commission was duly executed, and the return thereof together with the deposition of His Highness taken thereunder now forms part of the record of this case.

"That the examination of His Highness the Nizam, whether under commission or in open Court, was in his own dominion a thing unheard of in the annals of the Hyderabad State before the execution of the commission hereinbefore mentioned, and great dissatisfaction was expressed by a large portion of His Highness's subjects on hearing that he was about to present himself for examination at such commission. And His Highness, in order as far as possible to allay the same, issued a special manifesto before the said commission was opened; and I say that for His Highness to leave his State to give evidence in Calcutta would create still graver dissatisfaction, and in all probability serious disturbance would take place, as the subjects in question consider it in the highest degree derogatory to His Highness's dignity and position to attend and give evidence in any Court in British India.

"That the issuing of the commission in the Police Court by the said Presidency Magistrate was not opposed by the defence, but on the contrary was consented to by them. . . . . That the accused through his counsel had the fullest opportunity for cross-examining, and did cross-examine, the Nizam, and Mr. Woodroffe, counsel for the prosecution, intimated to Mr. Inverarity, counsel for the defence, before the commission closed (as the return shows), that it was the intention of the prosecution to use the deposition of His Highness, if the High Court permitted, and stated that His Highness

1891

QUEEN-EMPRESS v. A. M. JACOB.

through him expressed his readiness and willingness to be cross-examined then on all and every matter whatsoever relevant to this case; and Mr. Woodroffe further said that it was impossible for His Highness, regard being had to his position as Head and Ruler of the Hyderabad State, to be present in Calcutta to give his evidence in the High Court."

The deponent was then cross-examined on his affidavit and stated:—"I have heard that the Nizam leaves his territories and goes into other territories. I believe he has been to Ootacamund once; so far as I know he was there two or three months; but I am not sure. I did not hear that the Government of His Highness's State was paralysed during that time, but I have heard that he had his Ministers and Secretaries with him; there are three principal Secretaries. Sir Salar Jung the Second was Minister at that time. I do not know whether the State was paralysed on that occasion; I can't say, as I do not know what arrangements were made. The Nizam does leave his own territories on shooting excursions, for weeks at a time, four or five hours' journey by rail from Hyderabad. I don't know whether he takes his Minister and Secretaries with him on those occasions, but I know books and papers used to come to him every day from the Minister, and they were returned within a day or two. I mean books containing papers for the Nizam. It takes three days by rail from Hyderabad to Calcutta; if you leave on a Monday morning you would be at Calcutta on Thursday morning. The Nizam has been to Calcutta before, when he was young and not on the throne; he has also been, I believe, to Delhi during his minority."

On re-examination he stated as follows:—"If the Nizam was compelled to come to Calcutta, he would have to bring a large number of people with him; his coming here would entail his bringing up a large retinue with him, besides his Minister and Secretaries, all his personal staff; I should think not less than one thousand people would have to come with him. The Nizam told me it would cost him not less than fifty lakhs of rupees if he came here. According to my own opinion it would cost a great deal of money. I may mention that when the Nizam goes out into the country, even in his own dominions, he takes his zenana with him. He took his zenana with him, I believe, to Ootacamund.

Even if His Highness could transact his business here, it would be a great inconvenience for him to do so."

The evidence taken under commission was objected to by the defence, mainly on the grounds that the commission having issued from the Magistrate's Court could not be used in the High Court under section 507 of the Code, and that under the circumstances of the case, it was inadmissible under section 33 of the Evidence Act.

The Advocate-General (Sir *Charles Paul*) (with him Mr. *Woodroffe* and Mr. *Dunne*) :—I propose to put in the commission on two grounds, viz., under the Code and under the Evidence Act. The commission was applied for in the Magistrate's Court under section 503, and the Magistrate considered that the evidence should be taken on commission under that section. The objection to the commission, if it prevails, will make it necessary for a second commission to issue from this Court. Unless some particular advantage could be gained by a second examination, so soon after the first, which was one in which the accused was represented by counsel, I apprehend the commission would be accepted as evidence, unless there is anything to prevent it being received. Section 507 allows the commission to be read in evidence in the case, and makes it part of the record. There is a difference in the language used in sections 503 and 507. The ruling of Mr. Justice Prinsep in *Empress* v. *Dabee Pershad* (1) as to the word "case" referring to the particular enquiry before the Magistrate's Court is an incorrect interpretation of the section of the Code then in use. If it had been intended to confine the reading of the evidence to the enquiry before the trial, some other word than "case" would have been used. What is meant by the word "case?" Can it be said that a commission is not part of a case, or that a case concludes after commitment? A commitment is a preliminary stage in a case. If the word "case" refers only to the enquiry and commitment, there would be no need of cross-examination. I submit that reading sections 503 and 507 together, the commission forms part of the record of the case. The case continues to be a case until a verdict is given.

(1) I. L. R., 6 Calc., 532.

1891

QUEEN-EMPRESS v. A. M. JACOB.

Under section 33 of the Evidence Act it is also admissible. The accused had an opportunity of cross-examining, and the questions at issue in the Magistrate's Court were the same as in the present trial. It would be most unreasonable to expect the personal attendance of the Nizam, and it would cause enormous expense.

Mr. *Inverarity* (with him Mr. *Pearson* and Mr. *Garth*).—As to the argument under the Code, the Magistrate no doubt thought the commission was issuable under section 503, seeing that it would have been inconvenient to compel the personal attendance of the Nizam, and the more so when his evidence was not to be adjudged upon by the Magistrate, who was merely holding the enquiry to see whether a *primâ facie* case was made out. Supposing, however, the Magistrate was wrong in deciding that the commission should issue, is his decision to bind the High Court? In section 503 the word "case" is made use of. The word includes all the circumstance sattending the particular case before the tribunal deciding as to whether the commission should issue. Section 507 clearly only refers to the Court which issued the commission, as it states that the commission shall be returned to that Court. The proper course was for the prosecution to have applied to the High Court for a commission. They had ample notice in October that the Nizam's presence would be required. The Courts are, moreover, unwilling to examine the parties to a proceeding by commission: that is so in all civil cases, and *à fortiori* the same rule should apply to criminal cases. *In re Faridunnissa* (1) the Court refused to issue a commission to examine a complainant. I also refer to *Empress* v. *Dabee Pershad* (2), *Queen-Empress* v. *Burke* (3), *Empress* v. *Counsell* (4), in all of which the principle recognised was that a complainant should not be allowed to be examined on commission, but should be brought before the Court to give his evidence in the presence of the accused and before the tribunal which was to try the accused. With reference to the evidence given in Mr. Hormusjee Nusserwarjee's affidavit, and on his cross-examination and re-examination, it was no doubt clear from such evidence, if accepted, that heavy expenditure would be entailed by the Nizam attending the Court. But the statement of the witness as

(1) I. L. R., 5 All., 92.
(2) I. L. R., 6 Calc., 532.
(3) I. L. R., 6 All, 224.
(4) I. L. R., 8 Calc., 896.

1891

QUEEN-EMPRESS v. A. M. JACOB.

to the expenditure necessary was extravagant and preposterous, and cannot be entertained as a reason for the admission of the commission. There is therefore no ground for its admission under section 33 of the Evidence Act; and, further, the questions raised in the Magistrate's Court were not the same as are now raised, as a charge of breach of trust as a merchant has been added in this Court. In the information no reference is made to such a case. Abid's evidence was silent as to it. Moreover, the Nizam was examined in a private house at Hyderabad, and was subject to no temporal tribunal, and could not, if his statements were controverted, be indicted for perjury, and on this ground his evidence on commission could not be accepted in this Court—*Taylor* on Evidence, 1174.

The Advocate-General (Sir *Charles Paul*) in reply.—A complainant is a witness. The case of *Empress* v. *Counsell* (1) makes no mention of either section 503 of the Code or section 33 of the Evidence Act. The case *In re Faridunnissa* (2) is in favour of my proposition. In *Queen-Empress* v. *Burke* (3) the accused had not cross-examined the witnesses giving their depositions under commission. The word "case" in section 503 is used in a different sense to that in which it is used in section 507. The fact that the accused was not charged with criminal breach of trust as a merchant is a triviality. He was charged under section 409. I refer also to *In re Din Tarini Debi* (4) and *In re Hurro Soondery Chowdhrain* (5).

WILSON, J.—The prosecutor in this case, the Nizam of Hyderabad, was examined and cross-examined under a commission issued by the Chief Presidency Magistrate, during an enquiry before him, under the terms of section 503 of the Criminal Procedure Code. *Primâ facie* upon that section alone the deposition given under that commission would be capable of use only before the tribunal which issued the commission. But it has been suggested that by virtue of section 507 it followed that the evidence taken under that commission by the Magistrate is admissible in this Court on the present trial. It is contended that the words "may, subject to all just exceptions, be read in evidence in the case" apply not only to the enquiry going on before the Magistrate, but also to the

(1) I. L. R., 8 Calc., 896.
(2) I. L. R., 5 All., 92.
(3) I. L. R., 6 All., 224.
(4) I. L. R., 15 Calc., 775.
(5) I. L. R., 4 Calc., 20.

1891

QUEEN-EMPRESS v. A. M. JACOB.

subsequent trial before this Court. I think that is not so for several reasons. The sections must be construed distributively. The rational construction of the word "case" in section 507 is that the evidence is to be used during the course of the enquiry or other proceeding before the Magistrate. The Magistrate had only to enquire whether there was a *primâ facie* case or not, and on the question of the commission he had to consider whether delay, expense, or inconvenience would be occasioned on that enquiry if the Nizam had to attend to give his evidence. His decision upon that point was absolutely conclusive, but not so upon the question of the admissibility of the evidence. In other words, the propriety of the admission of the evidence should be decided, not by the Magistrate, but by the Court trying the case, and all convenience is on that side; otherwise the Magistrate, who has only to decide upon the question whether an unreasonable delay, expense or inconvenience would be incurred by compelling the attendance of the witness, would be deciding that the propriety of the admissibility of evidence in a particular case is to be binding on another Court.

The case appears to me to be covered by authority. There is the case of *Empress* v. *Dabee Pershad* (1) and an unreported case, the records of which I have sent for, which are sufficient authority, had I otherwise doubt of my construction of the section. I find in the unreported case an express decision of Prinsep and O'Kinealy, JJ., upon this point, namely, upon the power of a Judge to set aside a conviction upon the ground that a Sessions Judge had allowed to be used before him evidence taken under a commission issued by a committing Magistrate without first satisfying himself that the circumstances were such as warranted the issue of a commission under section 503 of the Code. There is also the case of the *Queen-Empress* v. *Burke* (2). Both on reason and authority, therefore, I hold that section 507 does not render evidence taken on commission issuing from the Magistrate's Court binding on this Court.

But is it admissible under section 33 of the Evidence Act? That section differs altogether from the language used in the Code. The Code allows the issue of a commission in the case of unreasonable

(1) I. L. R., 6 Calc., 532. (2) I. L. R., 6 All., 224.

1891

QUEEN-EMPRESS v. A. M. JACOB.

delay, expense or inconvenience. If the prosecution had desired to obtain evidence on commission before this Court upon the grounds of inconvenience, expense or delay, they might either have applied for it to this Court of Sessions, or have applied to the High Court after commitment for a fresh commission. They took neither of these courses, and they now desire to make use of evidence in this Court obtained by a former commission issuing from the Magistrate's Court. With reference to section 33, the evidence no doubt was taken before a person authorized by law to take it, but the witness, the Nizam, is not dead, and it cannot be said that he cannot be found, nor that he is kept out of the way, and it is not suggested that there would be any delay. The only objection to obtaining his presence here that can be raised is on the ground of expense of attendance, which it is alleged would be so great as to render his attendance unreasonable under the circumstances of the case. I do not say that section 503 does not include any party to a proceeding, but it is certainly primarily intended for the purposes of some witness other than the parties principally concerned—persons "whose presence could not be obtained without an amount of delay and expense, which under the circumstances of the case the Court considers unreasonable."

This case is one said to turn on a conversation between the prosecutor and the accused, and, therefore, if the evidence of the prosecutor could be obtained, it ought to be so obtained. It is of the highest importance that his evidence should be heard by the jury. On the other hand, if there was sufficient evidence to show that the expense would be unreasonable, the attendance of the witness might be dispensed with. There is evidence of expense—that given by Hormusjee Nusserwarjee in his affidavit, the third and fourth paragraphs of which are the only paragraphs which deal with expense; the rest of the affidavit deals with matter which may be of importance, but which I have no power to consider—they are matters of State policy. The gentleman who made the affidavit said in an off-hand way that the Nizam could not travel to Calcutta without a thousand people, or without his zenana, and this from motives of State policy. The cross-examination shows the absurdity of the views of Hormusjee Nusserwarjee as to expense. I think the case is not brought within section 33, and the evidence

1891

QUEEN-EMPRESS v. A. M. JACOB.

cannot therefore be read. But if an application is desired to be made in order to facilitate the coming of His Highness here, I shall be glad to consider it.

The Advocate-General (Sir *Charles Paul*).—Under these circumstances I apply for the issue of a commission to examine the Nizam on the grounds stated in the affidavit of Mr. Hormusjee Nusserwarjee.

[WILSON, J.—The difficulty seems to be in the time at which you make your application. The jury are sworn.]

Mr. *Inverarity*.—It would be without precedent to stop a trial to issue a commission to Hyderabad. It is impracticable to go on with the case and the commission at the same time. The prosecution have had time since October to make this application. The inconvenience alleged is not really that of the Nizam. The proclamation issued by the Nizam stated that the Nizam had no objection to appear in Court. But that "the love of his subjects was so great" that they objected to his giving evidence. Then does section 503 apply to complainants? The only inconvenience to the Nizam is that he is the Nizam. The interests of the accused have not been noticed by the other side.

The Advocate-General (Sir *Charles Paul*) in reply.

WILSON, J.—I do not think I can grant this application. I think that to do so would be wholly without precedent after the jury have been sworn, and whilst the trial is proceeding I do not think it would be right to do so. It would lead to great difficulties and to considerable inconvenience if I were to allow the case to be postponed. I do not see how the trial and the commission can go on at the same time. I do not think I can risk the danger of granting an adjournment and allowing the jury to scatter. The prosecution are bound to be ready with their case. I cannot grant the application.

Attorneys for H. H. the Nizam: Messrs. *Sanderson & Co.*

Attorneys for the accused: Messrs. *Morgan & Co.*

T. A. P.