

## REVISIONAL CRIMINAL.

Before Adami and Seroope, JJ.

FAZLUR RAHMAN

v.

KING-EMPEROR.\*

1927.

Feb., 17.

*Code of Criminal Procedure, 1898 (Act V of 1898), section 360—deposition not read over to witnesses—re-trial ordered—previous deposition whether admissible in evidence—Evidence Act, 1872 (Act I of 1872), section 145.*

Where a trial was set aside and a re-trial ordered on the ground that the depositions of the witnesses had not been read over to them in the presence of the accused, held, that in the subsequent trial the depositions recorded in the first trial could be put to the witnesses under section 145 of the Evidence Act for the purpose of contradicting them.

The petitioner, Fazlur Rahman, was put on his trial under section 326, Penal Code, and the two other petitioners were tried on charges under section 323. Their case came before the Deputy Magistrate of Arrah who convicted Fazlur Rahman under section 326 and sentenced him to one year's rigorous imprisonment and sentenced the other two to eight months' rigorous imprisonment each under section 323. An appeal was made to the Sessions Judge, and the ground taken was that the depositions of the witnesses during the trial had not been read out in the presence and hearing of the accused. On this ground the learned Sessions Judge ordered a retrial of the case, holding that the trial was vitiated by the omission to read out the depositions in the presence and hearing

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\* Criminal Revision no. 79 of 1927, from an order of T. Luby, Esq., i.c.s., Sessions Judge of Shahabad, dated the 8th January, 1927, affirming the order of Lala Ashutosh, Deputy Magistrate, 1st class, Arrah, dated the 15th November, 1926.

of the accused. Consequently a second trial was held of these three petitioners with the result that the petitioner Fazlur Rahman was sentenced to 18 months' rigorous imprisonment under section 326 and the other two petitioners were sentenced to rigorous imprisonment for six months each. On appeal the convictions and sentences were upheld.

*Sir Ali Imam* (with him *Noor-ud-din*) for the petitioners.

*C. M. Agarwala*, Assistant Government Advocate, for the Crown.

ADAMI, J.—The point taken by Sir Ali Imam on behalf of the petitioners is that the Deputy Magistrate who tried the case on the second occasion has refused to consider the statements put to the witnesses as contradicting the statements made at the first trial. The learned Deputy Magistrate in his judgment has stated

"As to the previous depositions of the witnesses before the Special Magistrate, there has been no compliance at all with the provisions of section 360, Criminal Procedure Code, and hence there is no guarantee of their absolute correctness. Consequently any attempt at contradiction by means of such incomplete records must fail".

Now in the first place, this point was not taken in the lower appellate court; and secondly I have asked Sir Ali Imam to point out in what way the statements taken in the previous case would have been helpful to the petitioners as contradicting the statements made in the second trial. Sir Ali Imam rightly concedes that he is unaware of any such contradictions as could affect the case.

The learned Deputy Magistrate is perhaps wrong in stating that these statements made in the previous trial could not be referred to for the purpose of contradicting the statements made in the second trial. Those statements may not possibly be used as evidence in the case in which they were made but nevertheless they

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are statements made by the witnesses previous to the trial and it was open to the defence to put those statements to the witnesses and in fact those statements were put to the witnesses and they were questioned with regard to them.

ADANI, J.

We have looked into the evidence in the present case and find that this is so. There is nothing then to show us that the petitioners have been in the least affected by the failure of the Deputy Magistrate to consider whether any contradictions that there may have been affected the prosecution case at all. I do not think that we are called upon in any way to interfere on the ground put forward.

Then the question of the severity of the sentence has been brought to our notice. Sir Ali Imam pleads on behalf of the petitioner Fazlur Rahman that the second trial has led to an increase of his sentence, and in regard to all three petitioners he pleads that the fact that they have twice been on trial should be taken into consideration.

Now with regard to the first plea, Fazlur Rahman took the risk when he asked for a fresh trial and with regard to all three petitioners it has to be remembered that it was their own fault that the trial had to be repeated. They put forward a ground before the Sessions Judge which was in fact accepted but which would not now be accepted after the ruling of their Lordships of the Privy Council. The offence committed was a very serious one considering the state of feeling between the rival parties at the time when the offence was committed; and in my mind the sentence is not in any way too severe. I do not feel inclined to interfere either with the conviction or the sentence and therefore the application must be rejected.

SCROOPE, J.—I agree.

*Rule discharged.*