

APPELLATE CRIMINAL.

Before Mr. Justice Scott-Smith and Mr. Justice Ffordē.

1924

 May 8.

MAM CHAND—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 54 of 1924.

Criminal Procedure Code, Act V. of 1898, section 288—Statement of witness before Committing Magistrate transferred to Sessions record—Whether “ testimony ” within meaning of section 157 of the Indian Evidence Act, I of 1872—and open to corroboration by previous statement by the witness made to the Police.

In the trial of M. C., the appellant, for the murder of his cousin B., the wife of M. C. made a statement before the Committing Magistrate that her husband had killed B. and then buried the body in a *kotha*. At the trial before the Sessions Judge she resiled from this statement, and her statement before the Committing Magistrate was put in evidence under the provisions of section 288 of the Code of Criminal Procedure, and in order to corroborate this statement a statement made by her before the Police was proved and put in evidence.

Held, that the evidence of the wife of M. C. recorded before the Committing Magistrate was, by the operation of section 288 of the Code of Criminal Procedure, just as much evidence in the case as that recorded at the trial in the Sessions Court, and was therefore “ testimony ” within the meaning of section 157 of the Indian Evidence Act, and her prior statement to the Police was consequently admissible in evidence to corroborate the one made before the Committing Magistrate.

Velliah Kone v. Emperor (1), followed.

Queen-Empress v. Jadub Das (2), referred to.

(1) (1922) 72 I. C. 529.

(2) (1899) I. L. R. 27 Cal. 295.

Appeal from the order of Rai Bahadur Lala Sri Ram, Poplai, Sessions Judge, Hissar, dated the 14th December 1923, convicting the appellant.

NANWAN MAL, for Appellant.

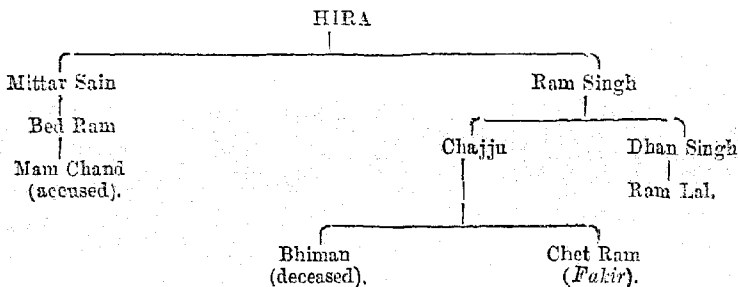
PUBLIC PROSECUTOR, for Respondent.

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The judgment of the Court was delivered by—

SCOTT-SMITH J.—Mam Chand, appellant, has been convicted by the Sessions Judge of Hissar of the murder of Bhiman, his cousin, on or about the night of the 13th February 1922, and has been sentenced to death. The pedigree-table from which the relationship of the appellant to the deceased will appear is as follows :—



According to the prosecution, the motive for the murder was to get possession of Ram Lal's land which was in the possession of Bhiman. Ram Lal shortly before his death made a gift of $7\frac{1}{2}$ *bighas* of land to Mam Chand, but died before mutation was attested. Bhiman appeared and claimed the land as Ram Lal's heir and mutation was effected in his favour. According to the evidence Mam Chand did not contest the mutation in Bhiman's favour, and the two of them lived quite happily together in Mam Chand's house. I therefore agree with the learned Sessions Judge that there is no clear evidence in this case of any motive for the murder on the part of Mam Chand. It appears from the evidence of Ram Chandar, *lambardar* (P. W. 5), that when Bhiman did not appear in the village

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for 2 or 3 days, he asked Mam Chand where Bhiman had gone to. Mam Chand said that he had gone to Delhi to see the *jalsa* there. A few days later people returned from the *jalsa*, but Bhiman did not come back. The witness again asked Mam Chand who replied that Bhiman might have gone to see his brother Chet Ram who is a *bairagi* and lives in Jasana. No trace of him was found there, and shortly afterwards Mam Chand disappeared from the village. The *lambardar* then on the 28th February reported the disappearance of Bhiman at the police station. On the 1st March the Sub-Inspector came to the village and was told by *Mussammat* Nihali (P. W. 2), the wife of Mam Chand, that her husband had killed Bhiman and buried him inside the *kotha*. The Sub-Inspector sent information of this to the Sub-Divisional Magistrate of Palwal, and on the 3rd March the latter together with the Civil Surgeon came to the village, and the place pointed out by *Mussammat* Nihali was dug up and the corpse of Bhiman was discovered buried there. There were numerous wounds on the body which indicated that he had been killed with blows of a sharp-edged weapon. A search was made for Mam Chand who could not be found, and he was not arrested until the 9th September 1923 on which day he presented a complaint (Exhibit P. S.) (page 8 of the paper-book) in the Court of the District Magistrate, Gurgaon, in which he accused Ram Chandar and others of the murder of Bhiman.

The chief witness for the prosecution is *Mussammat* Nihali. In her statement (Exhibit P. N.) (page 9 of the paper-book) made before the Committing Magistrate, she at first said that she did not know anything about the death of Bhiman, though she admitted that his corpse was recovered from the corner of his house. When further questioned she admit-

ted that her husband had killed Bhiman with a *gandasa* and had then buried the body in the *kotla*. She resiled from this statement at the trial, and the statement made by her before the Committing Magistrate was put in evidence under the provisions of section 288 of the Criminal Procedure Code. In order to corroborate this statement, a statement made by her before the police (Exhibit P. F.) (printed on pages 4 and 5 of the paper-book) was proved and put in evidence. A preliminary question arises whether it was admissible to prove the statement (Exhibit P. F.) in order to corroborate that made by the witness before the Committing Magistrate and transferred under the provisions of section 288 of the Criminal Procedure Code. Section 157 of the Indian Evidence Act says that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. Now, it is not denied that the statement (Exhibit P. F.) might be proved in order to corroborate the testimony of *Mussammatt* Nihali, but the question is whether the statement of *Mussammatt* Nihali transferred under section 288 of the Criminal Procedure Code is the "testimony" of a witness within the meaning of section 157 of the Evidence Act. Section 288, Criminal Procedure Code, lays down that the evidence of a witness duly taken in the presence of the accused before the Committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined be treated as evidence in the case. It was held by a Division Bench of the Madras High Court in the case of *Velliah Kone v. Emperor* (1), that the object and effect of section 288 of the Criminal Procedure

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Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court, and that such a deposition is "testimony" within the meaning of section 157 of the Evidence Act, which a prior statement by the witness is admissible in evidence to corroborate. I agree fully with the decision in that case and would hold that the evidence of the witness *Mussammatt Nihali* recorded before the Committing Magistrate is, by the operation of section 288 of the Criminal Procedure Code, just as much evidence in the case as that recorded at the trial in the Sessions Court and is, therefore, "testimony" within the meaning of section 157 of the Indian Evidence Act. A Division Bench of the Calcutta High Court in the case of *Queen-Empress v. Jadub Das* (1), said that it had been long settled by the decisions of that Court that unless there was something to show the truth of the former statement it should not be preferred to the statement made subsequently in the Sessions Court, that is to say, there should be something to corroborate that statement on some material point. I do not see in what better way the statement made by *Mussammatt Nihali* in the Committing Magistrate's Court can be shown to be correct than by the proof of a former statement made by her to the same effect. The part of the statement (Exhibit P. F.) on page 5, lines 31 to 49 of the paper-book, corroborates the statement made by her before the Committing Magistrate, printed at page 9, lines 26 to 40. No doubt the evidence of such a witness must be received with great caution, and probably it would not be safe to base a conviction upon it unless it were corroborated by other evidence. It is clear from the evidence of the doctor that there was blood on the walls of Mam Chand's house in which the body was found buried.

(1) (1899) I. L. R. 27 Cal. 295.

It is also proved that Mam Chand falsely stated that Bhiman had gone away to Delhi. It is further proved that a few days later Mam Chand absconded from the village and was not seen again for more than 18 months. He and Bhiman were living together in the house where Bhiman's dead body was found buried, and it cannot be believed that Bhiman could have been murdered and his body buried there without Mam Chand being privy to it.

I, therefore, consider that there is ample evidence in this case on which to base the conviction of Mam Chand for the murder of Bhiman, and I would accordingly dismiss the appeal and confirm the sentence of death.

FFORDE J.—I agree.

A. R.

Appeal dismissed.

FULL BENCH.

*Before Sir Shadi Lal, Chief Justice, Mr. Justice Broadway
and Mr. Justice Harrison.*

SULTAN SINGH AND ANOTHER (DEFENDANTS)

Petitioners

versus

MURLI DHAR AND OTHERS (PLAINTIFFS)

Respondents.

Civil Miscellaneous No. 412 of 1923.

1924

April 2.

*Civil Procedure Code, Act V. of 1908, section 109 (a)—
Application for leave to appeal to His Majesty in Council—
against an order deciding that plaintiffs have established their
locus standi to bring the action—"Final order"—meaning
of.*

The first Court dismissed the plaintiffs' suit on the ground that plaintiffs had no *locus standi* to sue. The High Court on