

1927

RASHID
 MUHAMMAD
 KHAN
 v.
 THE CROWN
 THROUGH MST.
 RAHMI.
 HARRISON J.

Crown, both in revision and in appeal. Under the circumstances, I have thought it best to give counsel an opportunity in this Court to support the original order from the judgment of the trial Court. It is contended that the case was false and was brought to harras the accused. As to the falsity of the case the finding is, in my opinion, not quite satisfactory. This being so, I think the order regarding compensation was rightly cancelled on the merits and I dismiss the petition.

N. F. E.

Revision dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Fforde and Mr. Justice Addison.

LEKAL AND OTHERS, Petitioners

versus

THE CROWN, Respondent.

1927
 March 3.

Criminal Revision No. 1169 of 1926.

Criminal Procedure Code, Act V of 1898, section 350—Retrial by a second Magistrate—whether evidence recorded by the first Magistrate of a witness, who has died since, can be relied on by the second Magistrate—Indian Evidence Act, I of 1872, section 33.

This case was first heard by one Magistrate and was subsequently tried *de novo* by another Magistrate and at the request of the accused the witnesses were resummoned and re-heard; one of them, Gulzara, whose statement had been recorded by the first Magistrate having died before the retrial, his evidence was relied upon by the Magistrate to whom the case had been transferred.

Held, that the evidence of Gulzara could be relied upon in the retrial before the second Magistrate under the provisions of section 33 of the Indian Evidence Act, which were in no way affected by section 350 of the Criminal Procedure Code.

Sahib Din v. Crown (1), disapproved *pro tanto*.

Application for revision of the order of Rai Bahadur Lala Ganga Ram, Soni, Sessions Judge, Ludhiana, dated the 16th June 1926, affirming that of M. Muhammad Fida Ullah, Magistrate, 1st class, Ludhiana, dated the 10th May 1926, convicting the petitioner.

1927

LERAL
v.

THE CROWN.

DURGA DAS, for MOTI SAGAR, for Petitioner.

D. R. SAWHNEY, Public Prosecutor, for Respondent.

[The order of Mr. Justice Coldstream, dated 6th October 1926, referring the case to a Division Bench.]

The only point argued is that the conviction is mainly based on the dying declaration of Gulzara which, according to the principle apparently enunciated at lines 27 to 32 of page 126 in 3 Lahore 115, ought not to have been admitted. These *obiter* words in that ruling do seem to imply that the provisions of section 33 of the Evidence Act can be nullified by a transfer and *de novo* hearing. I think that the matter is one for consideration by a Division Bench. Admitted. As the case involves a point of law of some importance it should be heard by a Division Bench.

JUDGMENT.

FFORDE, J.—There appears to be some confusion about this reference. It is alleged by the learned Judge who referred it that the only point argued before him was that the conviction was mainly based upon the dying declaration of one Gulzara. In point

FFORDE J.

1927
 LEKAL
 v.
 THE CROWN
 FORDE J.

of fact the learned appellate Judge has stated that it is not necessary to discuss whether this statement was admissible or not, though he was of opinion that it was admissible under the provisions of section 32 of the Evidence Act. But what he has admitted is the statement made by Gulzara before the first Magistrate who tried the case. When the case was heard *de novo* by the Magistrate to whom it had been transferred Gulzara was dead, and the evidence which he had given in the first judicial proceeding was proved and relied upon by the learned Magistrate to whom the case had been transferred. The petitioner in the trial before the learned Magistrate had asked, in accordance with the provisions of section 350 of the Criminal Procedure Code, that the witnesses who had given evidence against him in the first judicial proceeding should be resummoned and reheard. As the witness Gulzara was dead it is obvious that he could not be resummoned. The other available witnesses were resummoned and their evidence was retaken. The procedure adopted has been strictly in accordance with law. The authorities cited have no bearing on this matter whatsoever. I am quite unable to follow the reasoning of Chevis J. in *Sahib Din and others versus Crown* (1). The provisions of section 33 of the Indian Evidence Act are in no way affected by section 350 of the Criminal Procedure Code.

These petitions are quite unsustainable and must be rejected.

ADDISON J.

ADDISON J.—I agree.

A. N. C.

Revision rejected.