APPELLATE CRIMINAL.

Before Mr. Justice Mya Bu, and Mr. Justice Dunkley.

1939
June 20.

AH PHUT AND OTHERS *v.* THE KING.*

Child as witness—Court's duty to test understanding and capacity to answer—Affirmation or oath to be administered to child—Absence of affirmation or oath—Admissibility of evidence—Weight to be given—Confession of a co-accused—Evidence Act, ss. 30, 118—Oaths Act, ss. 6, 13.

When a child is called as a witness the Court must satisfy itself by questioning the child that the child is capable of understanding the questions put to him and of giving rational answers. Although a child must be sworn or affirmed before giving evidence, nevertheless, if the child gives evidence without being sworn or affirmed, the evidence is still admissible ; but it is for the Court to decide what weight may be given to such unsworn testimony, and the evidence of a child must always be received with great caution.

Budha v. *Empress*, (1887) P.J. Cr. No. 31 ; *Fatu* v. *King-Emperor*, 6 Pat. L.J. 147 ; *Re G.C. Venkadu*, I.L.R. 38 Mad. 550 ; *King-Emperor* v. *Maity*, 24 C.W.N. 767 ; *Queen* v. *Sewa Bhogta*, 14 Ben. L.R. 294 ; *Queen-Empres* v. *Shava*, I.L.R. 16 Bom. 359, referred to.

The confession of a co-accused can only be treated as lending assurance to other evidence against the co-accused ; it cannot be relied upon as the main evidence.

Maung Mya v. *The King*, [1938] Ran. 30, approved.

Kyaw Zan for the appellants.

Tun Byu (Government Advocate) for the Crown.

MYA BU and DUNKLEY, JJ.—The three appellants have been convicted by the learned Sessions Judge of Mergui of an offence under section 396 of the Penal Code, and the appellants Ah Phut and Lan Taung have been sentenced to death and the appellant Sa Khon has been sentenced to undergo seven years' rigorous imprisonment.

At the beginning of the hearing of these appeals, learned counsel for the appellants urged that the evidence of Ma Shwe Tun May (p.w. 3), a child aged

* Criminal Appeals Nos. 388 to 390 of 1939 from the order of the Sessions Judge of Mergui in Sessions Trial No. 6 of 1939.

eight years, was not admissible because she had not been sworn or affirmed, and it is clear that the learned Sessions Judge deliberately refrained from administering an oath or affirmation to Ma Shwe Tun May on the ground of her tender years, and it is therefore necessary that we should make some observations for the guidance of the learned Sessions Judge regarding the manner in which a child of tender years, who has been called as a witness, should be treated by the Court.

Under section 118 of the Evidence Act :

"All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

Consequently, when a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself, by questioning the child, that the child is a competent witness within the meaning of section 118 of the Evidence Act. Under sections 5 and 6 of the Oaths Act, 1873, every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore, if the child is adjudged to be a competent witness, an oath or affirmation must be administered to the child before he is examined.

In the present case learned counsel for the appellants, in submitting that the evidence of Ma Shwe Tun May is inadmissible on the ground that she was advisedly neither sworn nor affirmed, relied upon the case of *Deya* v. *King-Emperor* (1), the headnote of which reads as follows :

"Section 6 of the Oaths Act (X of 1873) imperatively requires that no person shall testify as a witness except on oath or

(1) 9 L.B.R. 88.

1939

AH PHUT v. THE KING.

MYA BU and DUNKLEY, JJ.

affirmation, and notwithstanding section 13 of the same Act, the evidence of a child is inadmissible if it has advisedly been recorded without any oath or affirmation."

In coming to this decision the learned Judges professed to follow two decisions of the Allahabad High Court, namely, *Queen-Empress* v. *Maru* (1) and *Queen-Empress* v. *Lal Sahai* (2). With the greatest respect, the second case is no authority for the proposition advanced, for all that was decided in that case was that the evidence of a child could not be recorded without administering to him an oath or affirmation. The decision in *Queen-Empress* v. *Maru* (1) has been overruled in *Emperor* v. *Dhani Ram and another* (3). In our opinion, the provisions of section 13 of the Oaths Act are so plain as to admit of no misunderstanding. They are as follows :

> " No omission to take any oath or make any affirmation, ... shall invalidate any proceeding or render inadmissible any evidence whatever,".

The word " omission " is used in the section without any qualification and, consequently, it must be held to include any omission whether that omission was deliberate or inadvertent. This is the view of the law which is now taken by all the High Courts. [See *The Queen* v. *Sewa Bhogta* (4), *King-Emperor* v. *Sashi Bhusan Maity* (5), *Queen-Empress* v. *Shava* (6), *Re G. China Venkadu* (7), *Fatu Santal* v. *King-Emperor* (8) and *Budha* v. *Empress* (9).] It is therefore clear that the word " omission ", as used in section 13 of the Oaths Act, includes any kind of omission and is not restricted to accidental or negligent omissions. Hence,

(1) 1888 I.L.R. 10 All. 207.
(2) (1888) I.L.R. 11 All. 183.
(3) (1915) I.L.R. 38 All. 49.
(4) 14 Ben. L.R. 294.
(5) 24 C.W.N. 767.
(6) (1891) I.L.R. 16 Bom. 359.
(7) (1913) I.L.R. 38 Mad. 550.
(8) 6 Pat. L.J. 147.
(9) (1889) P.R. Cr. No. 31.

although a child must be either sworn or affirmed before giving evidence, nevertheless if the child gives evidence without making an oath or affirmation his evidence is still admissible ; but, as learned counsel for the appellants has pointed out, it is for the Court to decide what weight may be given to such unsworn testimony, and the evidence of a child must always be received with great caution. We do not propose to place any reliance on the evidence of Ma Shwe Tun May in this case.

The appellant Sa Khon made a confession, and in the course of his judgment the learned Sessions Judge said :

" The main evidence for the prosecution is that contributed by the accused Sa Khon in his confession recorded by the Second Additional Magistrate, Mergui, on the 12th December 1938."

How the confession of a co-accused can be the main evidence in a case we are unable to understand. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of section 30 of the Evidence Act. It is not given upon oath and it is not tested by cross-examination. The correct view of the confession of a co-accused has been laid down by Mackney J. in *Maung Mya and another* v. *The King* (1), the head-note of which is as follows :

" Section 30 of the Evidence Act provides that the Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

Consequently, the confession of Sa Khon can, in this case, only be used for the purpose of corroborating

(1) [1938] Ran. 30.

1939

AH PHUT v. THE KING.

MYA BU and DUNKLEY, JJ.

the evidence given by the witnesses upon oath. For that purpose the confession of the appellant Sa Khon is, in our opinion, practically valueless. It is only necessary to read the confession to see that Sa Khon has made it in such a way as to exculpate himself as far as possible, and for this reason its truth is open to the gravest doubt.

[Discussing the evidence their Lordships altered the convictions to convictions under s. 394 of the Penal Code and reduced the sentences to seven years except in the case of Sa Khon.]