APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* SHAVA AND ANOTHER.*

1891.
December 21.

Oaths Act (X of 1873), Sec. 13—Omission to administer an oath or affirmation—Evidence—Witnesses—Competency of persons of tender years.

At a trial on a charge of murder one of the witnesses for the prosecution was a girl about ten years old. The Sessions Judge allowed her to be examined without administering any oath or affirmation, as it was found that she did not understand the nature of either. The prisoner's counsel objected to the admissibility of her statements, but the objection was overruled, and the prisoner was convicted of murder and sentenced to death.

Held per Jardine, J., that the girl's evidence was admissible. The "omission" referred to in section 13 of the Indian Oaths Act (X of 1873) includes any kind of omission, and is not restricted to accidental or negligent omissions.

Queen v. *Sewa Bhogta*(1) approved and *Queen-Empress* v. *Maru*(2) dissented from.

THIS was a reference to the High Court under section 374 of the Criminal Procedure Code (Act X of 1882) for confirmation of the sentences of death passed by G. MacCorkell, Sessions Judge of Ahmedabad, in the case of *Queen-Empress* v. *Shava Nátha*.

The accused were charged with the murder of one Moti under section 302 of the Indian Penal Code (XLV of 1860).

The direct evidence against the accused was that of Dolji, a boy about twelve years old, and of Rámbái, a girl about ten years of age.

The Sessions Judge allowed Rambái to be examined without any oath or affirmation being administered to her, as it was found that she did not understand the nature of an oath or affirmation. She was only warned to speak the truth.

Counsel for the accused objected at the trial to the admissibility of the evidence of both Dolji and Rambái, on the ground that neither of them knew the nature of an oath or solemn affirmation, or the result, here or hereafter, of telling a lie.

* Confirmation Case, No. 22 of 1891.

(1) 14 B. L. R., 294, S. C. ; 23 W. R. A., 1. (2) I. L. R., 10 All., 207.

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The Sessions Judge overruled this objection, holding that section 13 of the Oaths Act (X of 1873) covered a case like the present, and directed the jury that they were entitled to consider the evidence of both the witnesses, and attach such weight to it as they thought fit.

The jury returned a verdict of guilty against both prisoners.

The Sessions Judge, agreeing with the jury, convicted the prisoners of murder under section 302 of the Indian Penal Code, and passed sentence of death on both prisoners, subject to confirmation by the High Court. Against this conviction and sentence the prisoners appealed to the High Court.

Nagindás Tulsidás for the accused :—The only direct evidence against the accused is the evidence of the children Dolji and Rambái. Their evidence is inadmissible. They are both under twelve years of age. It is doubtful if they had sufficient capacity to understand the questions put to them or to give rational answers to those questions. Under section 118 of the Evidence Act the Sessions Judge ought to have satisfied himself on this point before allowing these children to be examined. It is quite clear that neither of them understood the nature and sanctity of an oath or affirmation. The girl was not even affirmed before she was examined, and this omission was not accidental, but intentional. That being so, the omission is not covered by section 13 of the Oaths Act (X of 1873) : see *Queen-Empress* v. *Maru*[1] ; *Queen-Empress* v. *Lál Sahai* .

Shivrám V. Bhandárkar for the Crown :—As to the competence of the children to be examined as witnesses, their depositions clearly show that they understood the questions put to them, and gave rational answers. They have intelligently related what they saw or heard. They thus satisfy the requirements of section 118 of the Evidence Act. Then, as to the effect of the omission to administer an oath or affirmation to the girl Rambái before she was examined, the language of section 13 of the Oaths Act is wide enough to include an intentional omission —*Queen* v. *Sewa Bhogta*[3].

(1) I. L. R., 10 All., 207. (2) I. L. R., 11 All., 183.
(3) 14 B. L. R., 294.

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JARDINE, J.:—The prisoners Shava and Pahádu, sons of Nathu, were convicted, by the unanimous verdict of the jury, of the murder of Moti, and were sentenced to death by the Sessions Judge of Ahmedabad. The case comes before this Court on the reference of the Judge, and the appeal of the convict.

Questions of fact and law have been argued before us with which we have now to deal. I am satisfied, on the evidence, that the corpse discovered on the 17th August in the dunghill in the prisoners' yard adjoining their houses is that of Moti, a boy about eight years old, the son of a neighbour named Bhagati. As the throat had been cut and the legs chopped off below the knees, I do not doubt that the boy was murdered, nor that the date of the murder is that charged, *viz.*, the 14th August.

I believe also the evidence that on the evening of that day the boy was wearing silver ornaments, and that they had been removed from his body. This property was doubtless the motive for the crime.

There is evidence that on the 18th August, and not before, a search was made in the houses of the convicted prisoners when a silver anklet was found buried in Shava's house, where also a top was found, another silver anklet in Pahádu's house, and two silver wristlets in the house of the acquitted prisoner Ránu. These articles are sworn to as those which the boy had with him on the evening of the day he was missed, the 14th August. We must assume that the jury believed this evidence so far as it tells against the two prisoners whom they found guilty.

Besides the above, there is the more important evidence of two children who when examined by the Magistrate on the 25th and 26th August declared that they had witnessed the whole circumstances of the murder of the boy by the three prisoners. They said that Shava called Moti into his house and then held him down by the throat, after which Pahádu cut his throat with a knife, the other two men holding him down at the time, that the body was then taken into Pahádu's house, and after that during the same night into Ránu's house, and then back to Pahádu's house, whence it was removed the next night to the

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dunghill. They said they heard sounds of chopping in Ránu's house after the body had been carried to that house.

At the trial, the boy Dolji, who is son of Shava and nephew of Pahádu, denied most of his former story which he said he had made through fear. He professed not to recognize either of the prisoners, his father and uncle, and to be unable to recognize them as the same persons who appeared before the Magistrate. His age is given as twelve years. He was examined on solemn affirmation. He deposed at the close of his deposition that he did not know what happened to people who told lies or what is the nature of an oath. He was apparently treated as a hostile witness and in his examination-in-chief he was questioned about what he had told the Magistrate, and in this way although his deposition before the Magistrate was not read at the trial, the drift of it was brought to the notice of the jury.

The other child, Rambái, whose age is stated as ten years, with a remark that she appears older, was not examined on either oath or any sort of affirmation. She is the daughter of Pahádu, but she said she did not recognize the prisoners at the bar; but she testified against her father and uncle and Ránu by name as the murderers, and generally told the same story she had told the Magistrate. She added thereto that she had actually seen the body in a quilt, and witnessed the putting into the dunghill, thus contradicting what she told the Magistrate.

It appears that in the Court of Sessions much objection was taken to the testimony of these children as inadmissible, and the same points have been argued in this Court.

The objection taken by Mr. Nagindás, as against Dolji, is that before examining him and administering the judicial affirmation, the Sessions Judge ought by inquiry to have satisfied himself that Dolji was not by tender years or any other cause of the same kind prevented from understanding the questions put to him, or from giving rational answers to those questions, which is the test of competency supplied by section 118 of the Indian Evidence Act, 1872. The judgment of Mr. Justice Straight in *Queen-Empress* v. *Lál Sahai*[1] was relied on. I do not think this

[1] I. L. R., 11 All., 183.

objection is sustainable, as there appears to have been no reason to induce the Sessions Judge to presume that Dolji was deficient in intellectual capacity; and, moreover, the deposition given to the Magistrate showed that he was fully intelligent. If that deposition is true, and the same remark applies to that of the girl Rambái, they possess extreme intelligence, great detective power, amazing nerve, and excellent memory. They said they were refused admittance to Shava's room at the time of the murder, but that it was committed with the door open, and that they stood by and saw their father and uncle and Ránu murder their playmate, and then followed to Pahádu's house, and kept their ears open also to what went on in Ránu's house. While I think the Session Judge might well have made fuller remarks on Dolji's evidence, and cautioned the jury that children are easily frightened and easily tutored, and that he had abandoned his original story, and was a witness hostile to the prosecution, I also assume that most of these considerations must have been present to the jury, and that they were aware that before them the only witness professing to have seen the murder was the girl Rámbái.

The same objection about intellectual competency is taken against her, but I think it is to be answered in the same way as that about Dolji's intellectual capacity.

Another objection is, however, urged against the admissibility of her evidence. It was urged below and in this Court, that the Judge erred in allowing her to be examined as a witness without any sort of oath or affirmation whatever, and that he ought in his charge to have directed the jury to disregard it. The decision of Mr. Justice Mahmood sitting alone in *Queen-Empress* v. *Maru*[1] supports this contention; and it was regarded with approval by the Bench which decided *Queen-Empress* v. *Lál Sáhai*[2] as appears from Mr. Justice Straight's judgment. It is, however, opposed to the decision of the majority of the Full Bench in *Queen* v. *Sewa Bhogta*[3] (Couch, C.J., Kemp, Phear, and Markly, JJ.,) Jackson, J., dissenting. As the history of the Indian enactments about judicial oaths and affirmation is given in

(1) I. L. R., 10 All., 207. (2) I. L. R., 11 All., 183, at p. 185. (3) 14 B. L. R., 294, p. 20—8

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Mr. Justice Mahmood's exhaustive judgment, I need not travel over the same ground. I concur in the conclusions stated on page 221 of the report as to what the Legislature intended in enacting the present law. I concur also in the following observations of Mr. Justice Straight in *Queen-Empress* v. *Lál Sahai*(1). "What I take the law to say is—and a very sound and sensible law I hold it to be—that a Court is to ascertain in the best way it can whether, from the amount of intellectual capacity and understanding of a young or old person, that person is able to give rational and intelligent account of what he has seen or heard or done on a particular occasion, and if the Court is satisfied that a child of twelve years, or an old man or woman of very advanced age, can satisfy those requirements, the competency of the witness is established. I am very clearly of opinion that having regard to the language of the Oaths Acts, neither a Judge nor a Magistrate has any option when once he has elected to take the statements of a person as evidence, but to administer either the oath or affirmation to such persons as the case may require, and I think it well that this should be understood by such tribunals."

The Legislature has by no means abandoned oaths. Although a statutable exception appears in section 200 of the Code of Criminal Procedure, a statutable requirement appears in section 281, a new provision overruling *Reg.* v. *Lakshuman*(2), which decides that jurors in a Court of Session need not be sworn. The language of the Oaths Act X of 1873 throughout, especially in sections 5 and 6, seems to me clear as to the duty of the Courts, and I know of no authority to the contrary, neither is it dissented from by the Calcutta Bench. For these reasons I am of opinion that the girl Rambái ought not to have been examined as a witness until she had made the proper affirmation.

We called on the Sessions Judge to report how the omission occurred. He has stated that the reason was that the pleader for the accused objected to her being examined on solemn affirmation, and that as she stated she did not understand the nature of solemn affirmation or oath, the learned Judge thought it necessary to warn her to speak the truth before examining her.

(1) I. L. R., 11 All., 183. (2) 3 Bom. H. C. Rep., 56 C. C.

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In his charge to the jury he directed that her deposition was evidence under the saving section 13 of the Oaths Act. This direction also included the evidence of Dolji, which was left to the jury with the remark that he knows neither the nature of an oath nor the result here or hereafter of telling a lie. It does not appear that the pleaders at the trial referred to the Indian cases, nor does the Judge notice them; the question there seems to have been whether the law of England as stated by Roscoe applies. The difference between the law of the two countries is stated in 2 Stokes' Anglo-Indian Codes, Adjective Law, 831, and in my opinion correctly in these terms:—"Under section 118 of the Evidence Act a child is competent to testify if it can understand the question put to it, and give rational answers thereto. In England a child to be a competent witness must believe in punishment in a future state for lying." In *Queen-Empress* v. *Maru*[1], which is on all fours with the present, Mahmood, J., expresses opinion that an inability from tender years to comprehend either the spiritual or legal obligations of an oath or solemn affirmation is tantamount to intellectual incapacity, and makes the child incompetent to be examined as a witness at all. With so broad a proposition not supported by authority I am unable to agree. This objection of Mahmood, J., did not apparently occur at all to Sir Richard Couch, C.J., and the other Judges in Sewa Bhogta's case, and is, as Mahmood, J., admits irreconcileable with that decision. Again in *Queen-Empress* v. *Lál Sahai*[2] occurs the following passage which I adopt as correct law:—"Either a person is or is not made a witness: if he is made a witness, then the law of this country requires that he be either sworn or affirmed. The competency of such person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn or affirmed: the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed, and has given his evidence as a witness.

"As to the competency of witnesses, that is specifically and in terms declared by section 118 of the Evidence Act, and I find in that section no direction or intimation to a Court which has to deal with the question whether a person should or should not

(1) I. L. R., 10 All., 207. (2) I. L. R., 11 All., 183, at p. 185.

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be examined, that it is to enter upon inquiries as to his religious belief and open up such a field of speculation as is involved in the query, 'What will be the consequences here or hereafter if you do not tell the truth?'" On such questions as the nature and effect of oaths, lawyers and divines differ among themselves, and opinions change from age to age and vary in different countries. The debates in Parliament about Mr. Bradlaugh's oath illustrate this remark. The Indian Legislature has not discarded the religious sanction, but has made provision for persons who object to oaths These may be allowed to affirm. The Imperial Parliament has in the same way in 32 and 33 Vict., c. 68, s. 4, recognized the existence of persons whose conscience is not bound by oaths. I think, therefore, the ignorance of a child on such a matter is not necessarily equivalent to an inability to understand ordinary questions and give rational answers. If it were, then the evidence of Dolji as well as that of Rambái would be inadmissible. This ignorance may sometimes be an objection to the credit, and combined with the fact that Dolji had certainly told lies in one or other Court ought to have been treated as a reason for great caution in dealing with his evidence. It is conceded by Mahmood, J., that an accidental or negligent omission to take oath or affirmation is saved by section 13 of the Oaths Act, and apparently the omission does not absolve from the punishment of perjury as it is not "to affect the obligation of a witness to state the truth." Section 13 saves such irregularities as the giving of a wrong form of oath or affirmation, of which instances are found in the case of *A. Vedamuttu*[1] and *Queen* v. *Itwarya*[2]. But according to the Calcutta Full Bench case from which Mahmood, J., differs, section 13 goes much further and includes any omission, and is not limited to accidental or negligent omission. In that case, as in the present case of Rambái, the omission to administer any affirmation whatever occurred deliberately and under the orders of the Judge. With much respect for the views of the Judges at Allahabad I concur in the interpretation placed on the law by Sir R. Couch, C.J., and his learned colleagues, and am of opinion that the irregularity was, as the Sessions Judge directed, saved by section 13. Such an irregularity is, however,

(1) 4 Mad. H. C. Rep., 185. (2) 14 Beng. L. R., 54.

a serious matter and has been so regarded in all the cases I have mentioned. The danger is that the Judge relying on the omission of any oath or solemn affirmation, may not make proper inquiry into the intelligent capacity of the child produced as a witness, or may fail to lay proper stress on the moral deficiency of a child or a weak-headed person who feels no moral restraint about lying, or who may very easily become the subject of improper influences. The credit of such a witness is, of course, further lessened when, as in Dolji's case, there is no knowledge of criminal punishment, nor fear of the Penal Code. In the present case we have no recorded remarks to help us about the demeanour of the two children, the manner of putting the questions, or the way the answers were given. I do not think that Dolji's retracted statements are entitled to credit. As regards Rambái, it seems to me somewhat improbable that the parents of the children would have committed the murder of the boy with the door open and the children looking on; and it is also somewhat improbable that the murderers would move the corpse about from house to house so many times. While I do not doubt, however, that the evidence of this eye-witness must have had an influence on the jury, there is other evidence in the case, *viz.*, that relating to the finding of the corpse and the ornaments in the premises of the prisoners; and on consideration of the case I am not prepared to overrule the unanimous verdict which the Sessions Judge accepted, or to alter the conviction for murder. But under the circumstances I would follow the Full Bench at Calcutta, and pass sentence of transportation for life on the two prisoners Shava and Pahádu.

PARSONS, J.:—I consider that, disregarding altogether the evidence of Rambái, there is sufficient evidence to conclusively prove the guilt of the accused. The question of the admissibility of the evidence of Rámbái need not, therefore, be dealt with by me. My learned colleague is for passing a sentence of transportation for life only, and I feel that I ought not to differ from him on that point, although the murder was a very cold-blooded and brutal one.

For the reasons stated above, their Lordships declined to confirm the sentence of death passed upon the accused by the Sessions Judge, and sentenced them instead to transportation for life