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28 C. 608.

Upon these materials we may fairly say that the applicant has proved his case. The appeal then must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The applicant claims the property of the deceased as his preceptor's preceptor. A claim like that can only rest upon custom. The rule of Hindu Law with reference to the property of an ascetic, such as the deceased was, contemplates the succession only of the preceptor himself (*see* Dyabhaga, Ch. XI, s. 6, para. 35). The custom, which is set up, is a custom applicable to the sect, to which the parties belong. And the only question is whether that custom has been proved. It is unnecessary for me to go into the matter at any length, as I agree entirely in all that has been said in the judgment of the learned Chief Justice. I only wish to add a few words with reference to two of the objections that have been urged against the validity of the custom by the learned Junior **[612]** Government Pleader, namely, that the custom is indefinite and that it is unreasonable.

As regards the first objection, there is nothing indefinite in the custom as set up in the petition of the applicant. There, what he says is, that the petitioner is the preceptor's preceptor of the deceased, and, as such, is entitled to receive Letters of Administration to the estate left by him. That is a very definite statement of the right by custom set up. The indefiniteness, which is imputed to the custom, is one that may attach to it, if we take a certain statement of the applicant in his deposition literally, that statement being, that on the death of the applicant, his sons and grandsons will be entitled to the property of his disciple's disciples. But I do not think that that statement should be taken literally. It is susceptible of this interpretation, namely, that after the applicant, his sons and grandsons in there turn will be entitled to the property of their disciple's disciples in their own right as preceptor's preceptor and not merely by reason of their being sons and grandsons of the applicant; and, if the statement is taken in that sense, there is nothing indefinite in the custom set up.

As to the second objection I have noticed above, that the custom is unreasonable, I need only say this that, though by this custom the right of the preceptor to inherit the property of his disciples is ignored, and the preceptor's preceptor acquires a right to inherit such property, that of itself does not make the custom so unreasonable, that we should refuse to recognize it. It may well be (and some of the facts appearing from certain of the documents go to show that is so) that, by reason of superior sanctity attaching to the family, to which the applicant belongs, the right to succeed has been conceded to the members of that family, in preference to the rights of the immediate preceptors of deceased disciples.

Appeal dismissed.

28 C. 613.

[613] APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Taylor.

GHATU PRAMANIK *v.* KING EMPEROR.* [1st June, 1901.]

Insane delusion—Unsoundness of mind—Criminal liability, test of—Penal Code (Act XLV of 1860), s. 84.

* Criminal Appeal No. 321 of 1901, made against the order passed by F. MacBlaine, Esq., Sessions Judge of Pabna and Bogra, dated the 20th of April 1901.

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Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof is to be therefore excused depends on the nature of the delusion. If he labours under such partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility, as if the facts, with respect to which the delusion exists, were real.

The accused was convicted of having murdered his brother-in-law, a lad 8 years old.

In his confession to the Magistrate the accused stated that he had seen the deceased arrange a clandestine meeting between his wife and a young man, whom he actually saw enter his wife's room some time before midnight and again leave it after a considerable interval, and that in consequence of what he saw he had not a wink of sleep that night and was devoid of his senses at the time he killed the deceased.

Held, that there was no doubt the accused did actually believe he had ocular proof of his wife's infidelity, and that if he had acted under the immediate influence of such a delusion, the estimate of his guilt must be made upon the basis of the actual existence of the facts in regard to which the delusion existed, and had the accused acted under the immediate influence of such provocation his guilt would have been greatly reduced, but as he did not do so, his offence was murder under s. 302 of the Penal Code, nor was there any ground for the application of s. 84 of that Code

IN this case the accused came on the 27th of October 1900 to his father-in-law's hut, where his wife, a girl of between eleven and thirteen years of age, was residing at the time. He slept that night in the same hut with his father-in-law, his brother-in-law, Sukh Lall, a boy of about eight years of age, and another brother-in-law, while his wife and mother-in-law slept in an adjoining hut. **[614]** At dawn on the 28th of October, while it was still dark, the accused struck Sukh Lall, who was sleeping on the same bed with his father, with an axe, which was in the hut. Sukh Lall died subsequently, in consequence of the wounds received. After striking Sukh Lall the accused ran away, throwing the axe into a jungle close by, and went to his own house, about two miles away, and stayed there, until the next day, when he was arrested by a constable and brought before a Magistrate, to whom he made a confession stating that he had seen Sukh Lall arrange a clandestine meeting between his wife and a young man, whom he actually saw enter his wife's room at night, and again leave it after a considerable interval, and that at the time he killed Sukh Lall he was, out of range and a feeling of disgrace, devoid of his senses. He was convicted on the 20th of April 1901 by the Sessions Judge of Pabna, under s. 302 of the Penal Code and sentenced to transportation for life.

No one appeared for the appellant.

GHOSE, J.—The appellant Ghatu has been convicted of the offence of murder and sentenced to transportation for life. The Judge and the assessors, who sat with him, were agreed as to the guilt of the accused, though one of the assessors was of opinion that he (the accused) was insane.

The person killed was a lad, 8 years old, and was the brother-in-law of the accused.

That he killed the accused, there can be no doubt upon the evidence. The only question is, whether he was at the time of unsound mind, and incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law and therefore excused from responsibility (s. 84 of the Indian Penal Code).

The occurrence took place early at dawn of the 28th October of the last year (12th *Kartic*). The appellant came on the preceding day to his

father-in-law's house, where his wife (a girl of 11 years as stated by the parents, but of 13, as stated by the girl herself before the Committing Officer) was residing at the time. He slept that night in the same hut with his father-[615] in-law, his deceased brother-in-law and another brother-in-law (a witness for the prosecution), while his wife slept with his mother-in-law in an adjoining hut, and at dawn, while it was still somewhat dark, he struck the deceased, who was sleeping on the same bed with his father, with an axe, which was in the hut, and then ran away, throwing the axe in a jungle close by and went to his own house, at a distance of about 2 miles, and he stayed there, until the next day, when he was arrested by a constable, and brought before a Sub-Magistrate, to whom he made a confession saying that, on the night of the occurrence, there was a *sankirtan* in the house of a neighbour of his father-in-law, where he was invited. To that *sankirtan* his wife did not go, and there he observed his little brother-in-law (the deceased) and his namesake and friend (Ghatu having a private conversation; that his namesake placed a rupee in the hands of the deceased, with which the latter went to the house of his father-in-law and entered into the hut, where his wife then was, and when he came away, his namesake went into the same hut, and left it after some little time; that he saw all this from a short distance; that, in consequence of what he saw, he had not a wink of sleep that night, and that he was out of his senses on account of the disgrace he felt, and that, at the time he killed the deceased, he was, out of rage and a feeling of disgrace, devoid of his senses. No notice seems then to have been taken by any officer of this last mentioned statement of the accused.

If the officers concerned had done their duty, the accused would have probably been placed under medical observation, in order to find out, if possible, whether he was of unsound mind at the time of the occurrence. But nothing seems to have been done. The preliminary enquiry was commenced early in November, the case was postponed several times, and it was not until the 13th March, that the accused was called upon to make a statement before the Committing Officer, when he retracted his confession, and alleged that he did not know what he had said before; that he had been maltreated by the police, and that what he did say was under compulsion. It cannot but be regretted that the enquiry in the Committing Officer's Court should have been conducted in this careless and dilatory manner.

[616] It does not, however, appear that anything else was said by the accused, or on his behalf, before the Committing Officer as to the state of his mind at the time of the occurrence; but the question seems to have been raised before the Sessions Court, as we may well gather, though we do not find any record of the plea raised by or on behalf of the accused (s. 271 of the Code). The only record that we find is that the charge was explained to the accused.

The learned Judge has accepted the confession of the accused and believed "the essential truth" of the statement made by him as to the motive for the act committed by him, *viz.*, that he saw that his wife was grossly unfaithful, and was assisted in her immorality by the deceased. He has disbelieved the statement by the parents that the wife went that night to the *sankirtan*, but seems to have accepted the story told by the mother that the accused came with a *dao* at midnight and unfastened the door of the hut, in which she and the girl were sleeping, but went back to the other hut when he was discovered, and has

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held that the defence of insanity was not proved, and further that his demeanour and conduct during the trial were perfectly those of a sane man.

The question, however, was not, whether at the time of the trial, the man was of unsound mind, but whether he was so at the time of the commission of the deed, and whether by reason of that unsoundness of mind he was incapable of distinguishing between right and wrong.

Some evidence has been adduced by the defence to the effect that the father and one of the brothers of the accused were lunatics, that he was of sullen disposition and became insane for a time, but, as stated by his mother, this was only up to *Ashin* last, and that, "he recovered and worked regularly in *Kartick*" (the occurrence being on the 12th *Kartick*). Assuming it to be true that he was of sullen disposition, and that for some little time before had a touch of insanity, it does not appear that there was anything like it, when he committed the deed, and it seems to me that the conduct of the accused in killing the deceased early at dawn, when his father-in-law was apparently asleep, and his brother-**[617]** in-law (Lalu) had gone out to ease himself (as the evidence shows), and the running away, throwing the axe, as he ran away, in a jungle and remaining quiet in his own house, until arrested, indicate that he was not in such a state of unsound mind as disabled him from distinguishing between right and wrong.

A difficulty no doubt arises upon the question of motive. According to the evidence for the prosecution, there was absolutely none for the crime. The parents of his wife, and the wife herself, deposed that she was but a young girl of 11, who had not yet attained puberty, and that she went to the *sankirtan* party with the accused and others that night; and therefore there could be no criminal intimacy between the other Ghatu and the girl, and that the accused could not have seen anything wrong. The learned Judge, as already stated, has disbelieved the story of the members of the family in this respect. And this he has done relying upon the statements made by the accused before the Sub-Magistrate on the 29th October.

Upon the evidence of the members of the family, the confession made and the motive assigned by the accused, would seem to be not genuine. But there is nothing to show that the confession was made under any compulsion, it was made on the very day that the man was arrested. And it is not improbable that the members of the family, having learnt the statements made by the accused before the Sub-Magistrate, thought it prudent, for the reputation of the family, to assert that the girl was not in the house, but went to the *sankirtan*, and that she had not attained puberty, though, as already stated, the girl herself gave her age before the Committing Officer to be 13.

If there was anything upon this record to indicate that the confession was not voluntary, but was influenced by the police, I should have considered it my duty to throw it aside.

If, however, the evidence of the members of the family as to the absence of motive be accepted, and if the confession was a voluntary one, it would seem that the man was labouring under some delusion at the time of commission of the deed; he must have imagined that he saw something very wrong in the conduct of his wife and his brother-in-law in relation to his namesake Ghatu. **[618]** And, labouring under this delusion, he was led to commit the

time. And it may also be that the mental derangement which, it is said, he had a little time previous to the occurrence (assuming that statement to be true) helped this delusion to some extent. But still I am unable to find that, when he committed the deed he was in such a state of unsound mind as incapacitated him from distinguishing between right and wrong. His conduct at the time of the commission of the deed and immediately after, rather indicate the contrary.

The learned Judge, as already noticed, seems to have accepted the story of the mother, that the accused was seen at midnight with a *dao* in his hand, and that he had unfastened the door of the room, in which the girl was sleeping. He had referred to this circumstance as a proof of his conduct shortly before the occurrence. I am, however, unable to accept this story as true. But, in the view I have already expressed it does not affect the question.

In this connection, I may refer to the case of *Queen-Empress* v. *Kader Nasyer Shah* (1), where the law on the subject was fully discussed. The facts in favour of the plea of insanity raised in that case were stronger than the facts in the present case. And it was held that the prisoner was not excused from responsibility. I may also refer to the well-known *Daniel M'Naghten's case* (2) in the House of Lords, where one of the questions put to the Judges was "If a person under an insane delusion as to the existing facts commits an offence, in consequence thereof, is he thereby excused," and it was thus answered: "To which question the answer must, of course, depend on the nature of the delusion. But making the same assumption, as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of his delusion he supposes another man to be in the act of taking away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a [619] serious injury to his character and fortune, and he killed him in revenge, in such supposed injury, he would be liable to punishment." This answer fits into the present case.

For these reasons, I am unable to interfere either with the conviction or the sentence of transportation for life, which is the only alternative sentence (other than death) that can be passed under s. 302 of the Indian Penal Code. It is not competent to this Court to pass any lesser sentence. It is, however, the prerogative of Government to consider whether in the exceptional circumstances of this case, mercy may not be shown to the prisoner by way of mitigation of sentence.

The appeal will be dismissed.

TAYLOR, J.—In this case the appellant has been convicted of the murder of his brother-in-law. The evidence shows that he had gone to the house of his father-in-law, and that the family retired to rest, the males in one house and the women in another. During the night the father-in-law of the appellant woke to find one of his sons wounded with a *dao*, and the appellant leaving the room. It is claimed that the appellant was seen to strike the blow, but, as the witness was not lying awake, I am unable to accept this as true. However, two other witnesses saw the appellant as he made off with his weapon, and there is no room for

(1) (1896) I. L. R. 23 Cal. 604. (2) (1843) 10 Cl. and Fin. 200.

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doubting that the deceased, a young boy, was killed by the appellant, who made a confession of the crime to the Magistrate. One blow was struck upon the head of the boy as he was lying asleep, it caused his death in the ordinary course of nature, and the offence is *prima facie* culpable homicide amounting to murder. I may mention that I do not believe the story of the mother-in-law of the accused, who claims to have seen accused prowling about armed, during the night. Had that been true she would have called attention to his action. In his confession the appellant stated that he had seen the deceased arrange a clandestine meeting between his wife and a young man, whom he actually saw enter his wife's room at night, and again leave it after a considerable interval. He says his mind became so disordered, that he did not know what happened. This intrigue is strenuously denied by the prosecution, but the learned Sessions Judge has believed that **[620]** the appellant did see what he claims to have seen. It certainly does seem improbable that he should have remained silent, if he had really seen a man pay a nocturnal visit to the room occupied by his wife, but I have no doubt that he did see something which led him to suspect his wife's fidelity, and to believe that the deceased was assisting in his dishonour. He must have brooded over this and resolved upon revenge.

If he had acted under the influence of such a delusion the estimate of his guilt must be made upon the basis of the actual existence of the facts in regard to which the delusion existed. I have no doubt that he did actually believe he had ocular proof of his wife's infidelity, so, whether he was under a misapprehension in that respect or not, his culpability will be the same. No doubt, if he had acted under the immediate influence of such provocation his guilt would have been greatly reduced, but he did not do so and his offence is murder under s. 302, if it does not appear that he is free from legal responsibility by reason of s. 84 of the Indian Penal Code.

It does not appear that there is any ground for the application of that section. There is no evidence to really prove his insanity at any period : he showed no signs of mental aberration either immediately be fore or after the act ; and he has, since his arrest, appeared to be sar e. I am unable to see any legal ground for interference, and I concur in dismissing the appeal. It may be that the Government will consider t he question of reducing the sentence. The great delay in the enquiry ca alls for departmental notice and is much to be regretted.

Appeal dismissed.

28 C. 621.

[621] PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch, and Sir Ford North.

HARRIS AND ANOTHER (*Plaintiffs*) *v.* BROWN AND OTHERS (*Defendants.*) [1st May and 22nd June, 1901.]

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

Will, construction of—Bequest to " eldest son to be born "—Estate—Direction that estate remain in hands of executor, until sons attain majority—Vesting of estate under such bequest, time of—Unconscionable bargain—Privy Council Appeal—Leave to appear.