31 C. 142 (=1 Cr. L. J. 86).

[142] FULL BENCH.

1902 JULY 17.

FULL BENCH.

Before Sir H. T. Prinsep, Kt., Offg. Chief Justice, Mr. Justice Hill, Mr. Justice Harington, Mr. Justice Brett and Mr. Justice Henderson.

EMPEROR *v.* ZAWAR RAHMAN.*

[17th July, 1902.]

31 C. 142=1 Cr. L. J. 86.

Trial by Jury—Evidence—Previous statement, admissibility of—Contradictory statement—Depositions before the committing Magistrate—Criminal Procedure Code (Act V of 1898), s. 238—Practice.

In a trial before a Court of Sessions, counsel for the prisoner is not entitled to refer to the depositions given before the committing Magistrate for the purpose of contradicting the witnesses before the Sessions Court, without drawing their attention to the alleged contradictions in their previous depositions and giving them an opportunity of explaining the same.

Empress v. *Haran Chunder Mitter* (1) overruled.

THIS was a reference to Full Bench under clause 25 of the Letters Patent and section 434 of the Criminal Procedure Code, by HARINGTON, J. presiding at the Criminal Sessions held on the 1st July, 1903.

The facts of the case and the point reserved for the decision of the Full Bench fully appear from the following letter of reference :—

" Under clause 25 of the Letters, Patent and section 434 of the Code of Criminal Procedure, I reserve and refer for the decision of the Court the question of law which (as hereinafter stated) has arisen in the course of the trial of the above named accused, and the determination of which may affect the event of the trial. At the Sessions held on 1st July of the present year the abovenamed accused was tried before me and a common Jury on a charge under section 52 of the Post Office Act, 1898, for that he being an officer of the Post Office stole or dishonestly misappropriated certain postal articles, to wit, three unregistered post letters in course of transmission by post. He was convicted by the Jury by a majority of 8 to 1. I accepted the verdict, but respited the sentence pending the opinion of the High Court on the following question which arose under the circumstances hereinafter set forth.

[143] After the case for the prosecution had closed counsel on behalf of the prisoner claimed a right to read to the Jury the depositions taken before the Magistrate for the purpose of shewing that the evidence given by the witnesses for the prosecution, when before the Magistrate, was contradictory to the evidence which they had given in the course of the trial before me. He cited in support of his contention the case of *Empress* v. *Haran Chunder Mitter* (1).

I was of opinion that each witness who was alleged to have given before the Magistrate evidence contradictory to that given in this Court was entitled to have his attention drawn to the particular passage in the deposition which was relied on as being contradictory to his evidence in Court, and to have the opportunity of explaining it, and that unless that was done, the depositions could not be referred to, or put in evidence for the purpose of contradicting the evidence given by the witnesses.

I therefore refused to follow the ruling in the case of *Empress* v. *Haran Chunder Mitter* (1) and declined to allow the depositions to be referred to.

Inasmuch as the case cited supports the contention raised by the learned counsel for the prisoner, I consented to reserve the question for the consideration of the Court under the clause of the Letters Patent and the section of the Code of Criminal Procedure, above referred to.

The question I reserve and refer for the decision of the Court is :—

Is Counsel for the prisoner entitled to refer to the depositions for the purpose of contradicting the witness without having drawn the particular witness's attention to the alleged contradiction in his deposition, and without having given him the opportunity of explaining it ?"

* Reference to Full Bench by Harington, J. exercising Original Criminal Jurisdiction.

(1) (1880) 6 C. L. R. 390.

1902
JULY 17.

FULL BENCH.

31 C. 142=1 Cr. L. J. 86.

Mr. *Mehta*, for the accused, contended that in the Court of Sessions he was entitled, on the authority of *Empress* v. *Haran Chunder Mitter* (1), to read to the jury (after the case for the prosecution had closed) the depositions of witnesses taken before the committing Magistrate for the purpose of showing that their evidence in the Sessions Court was contradictory to that given before the Magistrate; and he tendered those depositions at that stage of the trial.

[HENDERSON, J. Mr. Justice Wilson afterwards doubted the correctness of his decision in that case.]

But that decision had not yet been overruled, nor was there any reported case to show that it had not been followed. The depositions before the committing Magistrate formed part and parcel of the record of the Sessions Court, and the learned Judge was empowered under s. 228 of the Criminal Procedure Code to treat them as evidence. The case of *Reg.* v. *Arjun Megha* (2) was also referred to.

[144] *The Offg. Standing Counsel* (Mr. *J. G. Woodroffe*) for the Crown was not called upon.

PRINSEP, (*Offg.*), C.J. This reference has been made in consequence of the judgment in *Empress* v. *Haran Chunder Mitter* (1), the learned Judge who is holding the Sessions having reason to differ from the opinion expressed in that case. I may state at once that we learn under the authority of the reporter of that case, who is now a member of this Bench, that Mr. Justice Wilson, whose opinion is there reported, doubted the correctness of that report or expressed his opinion that it was bad in law; and so far as our experience goes, we are not aware that that case has ever been followed in this Court, and it is not certainly followed in any reported case.

On the point referred to us, I am of opinion that the course taken by the learned counsel for the accused, in this case, was not correct. He was not competent to tender the entire record of the proceedings of the Magistrate's Court, for the purpose of laying before the Jury any statements which might be contained therein as he thought proper. Unless the attention of a witness is expressly directed to any particular statement previously made by him, by reading it to him or allowing him to read it from the original deposition or an authenticated copy of it, any previous statement cannot be admitted in evidence in contradiction as to the statement that he has subsequently made. And in admitting any statement shown to be in contradiction to a statement made at a trial, that statement alone should be put in evidence and not the entire deposition. To allow any other course would not be fair to the witness and would represent him as having made a contradictory statement or statements which he might have possibly been able to explain if he had had a proper opportunity. Our answer is in the negative.

HILL, J. I am of the same opinion. It appears to me that there can be no serious doubt as to the proper practice to be followed in a case such as that which has been referred to us, and, it has, I think, been accurately stated by my brother **[145]** Harington in his referring order. I would therefore answer the question submitted to us in the negative.

HARINGTON, J. I adhere to the opinion which I expressed at the hearing of the case at the Sessions. I need only add that if at the close of the case a particular passage in any deposition had been brought to my attention, and it had been shown that that had been shown to the witness

(1) (1880) 6 C. L. R. 390. (2) (1874) 11 Bom. H. C. R. 281.

1902 JULY 17.

FULL BENCH.

31 C. 142=1 Cr. L. J. 86.

and he had been called upon to explain it, to admit it or deny it, it would then have become a question for consideration whether at that stage, after the witness had left the box, it was proper to admit the deposition under the circumstances which would not have given the learned counsel who was prosecuting, a chance for re-examining the witness on the matter in question. That question, however, though it has been touched on in this Court, did not arise, and I need only say that I adhere to the opinion I expressed in the Sessions Court and would answer the question which I have referred to this Court, in the negative.

BRETT, J. I am of the same opinion as my Lord the Chief Justice, and I would answer the question referred to us in the negative.

HENDERSON, J. I would also answer the question referred to us in the negative. It seems to me that until depositions in the Court below are tendered and received in evidence, or under section 288 of the Code of Criminal Procedure are treated by the presiding Judge as evidence, they cannot be used as evidence in the case.

---

31 C. 146.

[146] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice
Mr. Justice Hill and Mr. Justice Stevens.

JOGINI MOHAN CHATTERJI v. BHOOT NATH GHOSAL.*

[19th January, 1903.]

Mortgage—Property comprised in mortgage, non-existence of—Onus of proof.

In a suit to enforce a mortgage bond which was registered in the Sealdah Registry, on the ground that one of the properties mortgaged was in the Sealdah district, the defendant set up the defence that inasmuch as there was no such property in existence in the Sealdah district, the registration of the mortgage was bad, and the deed as a mortgage had no efficacy in law :—

Held, that the onus was on the defendant to show with every clearness that no property in the Sealdah district had been comprised in the mortgage.

APPEAL by the plaintiff, Jogini Mohan Chatterji, from the judgment of AMEER ALI, J., dated April 29, 1902.

The suit was originally brought by the plaintiff as Receiver of the estate of one Nobin Chunder Gangooly, deceased, to recover Rs. 1,000 with interest due on a registered mortgage-bond dated 10th October 1896.

The defendant, Bhoot Nath Ghosal, borrowed from the said Nobin Chunder Gangooly, a sum of Rs. 1,000, repayable at the end of one year from the date of the loan, together with interest at 24 per cent. per annum, and as security thereof executed a bond mortgaging certain immoveable properties situated partly within and partly without the local jurisdiction of the High Court. The mortgage-bond was registered at the Sealdah Sub-Registrar's office on the allegation that one of the properties mortgaged thereunder was situate in the Sealdah district.

On the 10th October 1898, Nobin Chunder Gangooly died, leaving a will, and in December 1900 certain beneficiaries under the will brought a suit for the administration of Nobin Chunder's estate. The plaintiff, an advocate of the High Court, was appointed Receiver of the said estate, and he instituted this suit for [147] the amount due on the bond. The

* Appeal from Original Civil, No. 15 of 1902, in suit No. 686 of 1901.