1905 MARCH 13.

APPELLATE CIVIL.

32 C. 749=9 C. W. N. 466 =1 C. L. J. 176.

Full Bench case, and another law for the parties in the present case. That does not seem to me to be right. If the defendant's contention be sound, the Court must, for all time, perpetuate an injustice, by saying the section is a bar, when the law says it is not a bar. I do not desire to be understood as saying that a point of law can never constitute *res judicata*.

The decision of the District Judge must be reversed and that of the Subordinate Judge restored with costs.

HOLMWOOD J. I concur.

Appeal allowed.

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32 C. 756 (=2 C. L. J. 105=9 C. W. N. 911=2 Cr. L. J. 459.)

[756] CRIMINAL REFERENCE.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

HAIDAR ALI *v.* ABRU MIA.*

[17th May, 1905.]

Defamation—Voluntary statement by witness—Privilege of witness—Malice—False Evidence—Penal Code (Act XLV of 1860), s. 500—Evidence Act (I of 1872), s. 132.

A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another, commits an offence punishable under s. 500 of the Penal Code.

Moher Sheikh v. *Queen-Empress* (1) followed.

Woolfun Bibi v. *Jesarat Sheikh* (2) discussed.

[Dist. 14 Cr. L. J. 100=18 I. C. 660=17 C. W. N. 297. Ref. 40 Cal 433; 36 Mad. 216; 7 I. C. 803=15 C. W. N. 995=14 C. L. J. 31; 59 I. C. 143=32 C. L. J. 94 =24 C. W. N. 982=22 Cr. L. J. 31.]

REFERENCE under s. 438 of the Code of Criminal Procedure.

In a criminal case instituted against one Haidar Ali for being in possession of false weights, Abru Mia, the complainant, was examined as a witness, and, while under cross-examination he voluntarily made a statement to the effect that 'Haidar had been beaten by one Kanu with a wooden shoe.' For this objectionable statement Haidar subsequently brought a charge of defamation against Abru.

The Extra Assistant Commissioner, who tried the case, found that Abru had voluntarily made that statement to injure the reputation of Haidar and that the statement was deliberately false; and he accordingly convicted Abru under s. 500 of the Penal Code and sentenced him to pay a fine of Rs. 50, in default to undergo simple imprisonment for one month.

The Officiating Deputy Commissioner of Cachar, on an application by Abru, made a report under s. 438 of the Code of [757] Criminal Procedure for the orders of the High Court, with a recommendation that the aforesaid conviction and sentence might be set aside on the grounds, which he stated as follows:

"That in my opinion the alleged statement made by the applicant was privileged under section 132 of the Evidence Act, and that it was made in answer to a question put to the witnesses in the course of a judicial proceeding The recent ruling of

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* Criminal Reference No. 97 of 1905, by W. M. Kennedy, Officiating Deputy Commissioner of Cachar, dated April 26, 1905.

(1) (1893) I. L. R. 21 Cal. 392. (2) (1899) I. L. R. 27 Cal. 262.

1905 MAY 17.

CRIMINAL REFERENCE.

32 C. 758=2 C. L. J. 105=9 C. W. N. 911=2 Cr. L. J. 459.

the Calcutta High Court in the case of *Woolfun Bibi* v. *Jesarat Sheikh* (1) appears to be applicable to the facts of this case. In that it was held that a witness cannot be prosecuted under section 500, I P C., for a relevant statement alleged to be defamatory made in the course of giving evidence in Court. In the present case the alleged shoe-beating incident cannot be said to be absolutely irrelevant to the issue as it was introduced with reference to the proceedings of the *panchayat* regarding which the applicant was being questioned. I therefore report the case under section 488, Criminal Procedure Code, and recommend that the conviction and sentence mentioned above be set aside.

The Magistrate, who passed the order recommended for revision, has nothing to add to his judgment by way of explanation."

No one appeared on this reference.

MOOKERJEE AND CASPERSZ JJ. The question before us in revision is whether the applicant, Abru Mia, was properly convicted under section 500 of the Indian Penal Code.

The facts found are these:—In a case concerning false weights, in which one Haidar Ali was the accused, the applicant (who was the complainant) deposed as a witness. He was asked:

(i) whether he knew one Kanu,

(ii) whether Haidar Ali had had any quarrel with Kanu, and

(iii) whether Kanu had asked pardon of Haidar Ali in a *panchayat*.

The convicting Magistrate goes on to say:—"The alleged objectionable statement was apparently made in continuation of the third question and not in answer to any put by the pleader cross-examining him." The statement so made was.

"Accused (Haidar Ali) admitted in the *panchayat* that Kanu beat him with a wooden shoe."

This was a false and very defamatory statement. There was no *panchayat*. Thus the applicant has been convicted under section 500 of the Indian Penal Code.

[758] We are not disposed to interfere in this matter."

The ruling in *Woolfun Bibi* v. *Jesarat Sheikh* (1) is no doubt in favour of the contention that Abru Mia should have been prosecuted for giving false evidence, and not for the offence of defamation. But that case makes no reference to section 132 of the Evidence Act, the proviso to which has been construed in *Moher Sheikh* v. *Queen-Empress* (2) to be not applicable to voluntary statements. On the other hand, some Bombay and Madras authorities, for instance *Queen-Empress* v. *Babaji* (3), *Queen-Empress* v. *Balkrishna Vithal* (4), *Manjaya* v. *Sesha Shetti* (5), go very much further than the above first cited ruling, and apply the English rule (of protection against indictment for defamation) to witnesses in this country. But that rule is stated in Odger's work on Libel and Slander (4th Edn., p. 227) to be subject to certain qualifications: "A remark made by a witness in the box, wholly irrelevant to the matter of enquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purpose, would not be privileged."

We think that even according to the above rule, as limited, Abru Mia has been rightly convicted. His voluntary statement as to shoe-beating was not revelant to the issue whether Haidar Ali was found to be in possession of false weights. It was not elicited by the pleader putting questions to Abru Mia. Again, it is perfectly clear, from the judgment of the Magistrate, that Abru Mia was actuated by malicious motives against

(1) (1899) I. L. R. 27 Cal. 262.
(2) (1893) I. L. R. 21 Cal. 392.
(3) (1892) I. L. R. 17 Bom. 127.
(4) (1893) I. L. R. 17 Bom. 573.
(5) (1888) I. L. R. 11 Mad. 477.

1905 MAY 17.

CRIMINAL REFERENCE.

32 C.-756=2 C. L. J. 105=9 C. W. N. 911=2 Cr. L. J. 459.

Haidar Ali, who is a wholesale dealer in the bazar, against whom the retail sellers have combined.

Then, the case of *Moher Sheikh* v. *Queen-Empress* (1) is directly in point, and we follow that authority.

We, therefore, decline to interfere.

Conviction upheld.

32 C. 759 (=9 C. W. N. 520=2 Cr. L. J. 259.)

[759] CRIMINAL REFERENCE.

Before Mr. Justice Henderson and Mr. Justice Geidt.

EMPEROR *v.* ABDUL HAMID.*

[24th March 1905.]

Thumb-mark—Thumb-mark, evidentiary value of—Blurred impressions—Expert opinion, grounds of—Judge—Jury—Power of Judge to question the Jury—Criminal Procedure Code (Act V of 1898) s. 303.

Where certain thumb impressions were blurred, and many of the characteristic marks, therefore, far from clear, thus rendering it difficult to trace the features, enumerated by an expert as showing the identity of the impressions, and the Court could only find a distinct similarity in some respects, *e. g.*, pattern and central core :—

Held that the Jury were not wrong in refusing to accept the opinion of the expert.

Per Geidt J. A Jury may decline to accept the opinion of an expert without the corroboration of their own intelligence as to the reasons which guided him to his conclusion with respect to the identity of the impressions.

Per Henderson J. It is only when it is necessary to ascertain what the verdict really is that s. 303 of the Criminal Procedure Code justifies the Judge in putting questions to the Jury.

Where, therefore, on a charge under s. 82 (*c*) of the Registration Act (III of 1877), the verdict was a plain and simple one of not guilty, the Judge was not empowered to ask the Jurors whether they found that the thumb impression on the bond alleged to have been forged was that of the accused.

[**Ref.** 9 P. R. 1914 Cr.; **Fol.** 27 I. C. 900=16 Cr. L. J. 228.]

CRIMINAL REFERENCE.

The accused, Abdul Hamid, was alleged to have falsely personated one Moshrof Ali, and in such assumed character to have admitted the execution of a bond purporting to have been made in favour of one Garon Ali, his cousin's husband, and to have presented the same for registration on the 5th November 1902 before the Sub-Registrar of Adhunagar. It appeared that on the 11th instant, the real Moshrof Ali went to **[760]** the Sub-Registrar, and lodged a written complaint before him that some person, not named, had falsely personated him and got the said bond registered, upon which an inquiry was held resulting in criminal proceedings being instituted against the accused and certain others. The accused was not, however, arrested till the 18th September 1904, and he was committed for trial on the 7th December last.

He was in due course tried before the Sessions Judge of Chittagong and a Jury on a charge under s. 82 (*c*) of the Registration Act (III of 1877).

During the trial one Mahomed Amin, a Sub-Inspector in the Criminal Investigation Department of the office of the Inspector-General of Police,

* Criminal Reference No. 3 of 1905 by B. K. Mullick, Sessions Judge of Chittagong, dated 23rd January 1905.

(1) (1893) I. L. R. 21 Cal. 392.