

1881

The *Standing Counsel* (Mr. *Phillips*) was not called upon.

EMPRESS
v.
DABEE
PERSHAD.

PRINSEP, J.—The question may be put. I agree in the opinion expressed by Phear, J., in *The Queen v. Macdonald* (1) that the Evidence Act draws a distinction between an admission and a confession of guilt. The other cases quoted are not altogether on the point.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.

1881

Jan. 31.

Evidence of Witness taken upon Commission, when admissible in Criminal Trial—High Courts' Criminal Procedure Act (X of 1875), s. 76—Presidency Magistrates' Act (IV of 1877), s. 158—Evidence Act (I of 1872) s. 33.

The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act.

In the course of the trial in this case, Mr. *Phillips* (The *Standing Counsel*) tendered, and proposed to read, the evidence of one Wayed Mabal Begum, taken upon commission issued by the Committing Magistrate under s. 158 of the Presidency Magistrates' Act (IV of 1877).

Mr. *Sale* for the prisoner objected. Before evidence taken on commission can be read in this Court in a criminal trial, it must be shown that the taking of such evidence was upon an order issued to that effect by the High Court under s. 76 of Act X of 1875. Here the order was made by the Committing Magistrate, and not by the High Court. The reason which induced the Magistrate to issue that commission may have ceased to operate in the time between the commitment and the trial of the accused in the High Court. Further, if the evidence attempted now to be put in is admissible, it would practically have the effect of subordinating the discretion given to the High Court under s. 76 of Act X of 1875 to the decision of the Magistrate on the same matter; in short, that the opinion of the Magistrate would be binding on this Court. Section 75

(1) 10 B. L. R. (App.), 2.

of the High Courts' Criminal Procedure Act (X of 1875), authorizes the Court to refer to the evidence of an absent witness, only in cases in which such is admissible under the Evidence Act or some other law on the same subject. There is no law under which the evidence now tendered can be admitted.

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 EMPRESS
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The *Standing Counsel* (Mr. Phillips) for the Crown.—There is evidence in the case that the witness Wayed Mabal Begum is one of the wives of the ex-King of Oudh, and therefore a *pardanashin*. It may, therefore, be presumed that the reasons which induced the Magistrate to grant the commission still exist, and would equally weigh with this Court. Further, s. 158 of the Presidency Magistrates' Act says, that the deposition once taken on commission shall "form part of the record." Section 76 of the High Courts' Criminal Procedure Act only refers to cases where cause has arisen for obtaining evidence on commission after commitment. [PRINSEP, J.—Section 33 of the Evidence Act appears not to be applicable to a case of this kind.]

PRINSEP, J.—The deposition is inadmissible. Section 76 of the High Courts' Criminal Procedure Act contemplates that evidence, when taken upon commission, if intended to be used in the High Court, must be taken upon an order made by that Court under that section. The terms of s. 158 of the Presidency Magistrates' Act, quoted by Mr. Phillips, refer only to the record of the trial or enquiry before the Magistrate. The evidence taken by a commission issued by order of a Magistrate could not here be admissible under s. 33 of the Evidence Act.