APPELLATE CRIMINAL.

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

GOURIDAS NAMASUDRA
v.
EMPEROR.*

1908
Nov. 21.

Dying declaration—Admissibility of petition of complaint and examination of complainant on oath as dying declarations—Record and mode of proof of such statements—Evidence Act (I of 1872) ss. 32, cl. (1), and 91—Criminal Procedure Code (Act V of 1898) s. 200—Assault by several but fatal blow by some one of them—Liability of each accused—Penal Code (Act XLV of 1860) ss. 34, 326.

A petition of complaint and the examination of the complainant on oath under section 200 of the Criminal Procedure Code are admissible as dying declarations under section 32, clause (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to the form of a document within section 91 of the Evidence Act so as to exclude parole evidence of their terms.

The statement admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it or heard it made.

Empress v. *Samiruddin* (1) and *King-Emperor* v. *Mathura Thakur* (2) followed.

Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was *held* that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code.

THE appellants, Gouridas, Gurudas and Girish, were tried by the Sessions Judge of Tipperah with the aid of Assessors, the first two being charged under section 302 of the Penal Code and the third under section 323. The Assessors found them not guilty, one of them being of opinion that the deceased

* Criminal Appeal, No. 703 of 1908, against the order of A. H. Cuming, Sessions Judge of Tipperah, dated July 22, 1908.

(1) (1881) I. L. R. 8 Calc. 211. (2) (1901) 6 C. W. N. 72.

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might have received his wounds in the fight between himself and Nanda and Sita, as alleged by the defence. The Sessions Judge, disagreeing with the Assessors, convicted the appellants, and sentenced Gouridas and Gurudas to transportation for life, and Girish to three months' rigorous imprisonment, by his judgment dated the 22nd July 1908.

The prosecution story was that the deceased, Saheb Ali, went to the house of Ali Bux on the 28th May, 1908, and started for home after a while with one Joynuddi. While going along an *ail* dividing some paddy fields, the three appellants, with one Nanda who is absconding, came from the north and attacked Saheb Ali, but, on Joynuddi crying out, people arrived and the accused ran away. Next morning Saheb Ali went to Brahmanberia, some three and a half miles distant, and filed a petition of complaint before the Deputy Magistrate, who examined him on oath, recorded his statement and sent him to hospital, where he died on the 31st. Gouridas and Gurudas each pleaded *alibi*. Girish admitted that a quarrel had taken place between him and the deceased over damage done to his crops by the latter's cattle, but denied any assault on his own part. The defence produced witnesses to prove that Nanda and Sita had, at the time of the quarrel, come with Girish and beaten the deceased.

The petition of complaint, Ex. (1), was proved by Saheb Ali's muktear's *mohurrir*, who had prepared it under personal instructions, and who deposed that Saheb Ali made a statement to him which was correctly recorded in the petition. The Deputy Magistrate who had examined the deceased, was not called to prove his examination, Ex. (1*a*), but the magisterial record was filed at the trial by the prosecution.

Babu Dasharathy Sanyal and *Babu Debendra Nath Bhattacharjee*, for the appellants.

Babu Atulya Charan Bose, for the Crown.

MACLEAN C.J. AND CARNDUFF J. The appellants before us are three *namasudras*, Gouridas, Girish and Gurudas, the

brother of Girish. They have been convicted by the Sessions Judge of Tipperah, who, differing from both the Assessors, has found Gouridas and Gurudas guilty of the murder of one Saheb Ali, and Girish guilty of having caused simple hurt to the deceased. Girish has been sentenced to three months' rigorous imprisonment under section 323 of the Indian Penal Code, while the sentence on each of his companions is transportation for life under section 302.

Two points of law have been raised, and these we will dispose of at once.

Saheb Ali was attacked and injured at Srirampore on the 28th May last. On the 29th he went to Brahmanberia and lodged a petition of complaint before the Magistrate, who examined him on oath, recorded his statement in compliance with the provisions of section 200 of the Criminal Procedure Code, and sent him to hospital, where he died on the 31st. The statement recorded by the Magistrate has been treated as a "dying declaration," and it has been proved by the production of the magisterial record, the learned Sessions Judge holding that, under section 91 of the Indian Evidence Act, no other evidence was admissible. In this connection it is contended (*i*) that the statement was a complaint and, therefore, not a "dying declaration," and (*ii*) that, if it was admissible as a "dying declaration," the Magistrate ought to have been examined to prove its contents.

In the first contention we find no substance. The statement to the Magistrate was clearly admissible under section 32, clause (1), of the Evidence Act, as having been made by the deceased as to "the circumstances of the transaction which resulted in his death;" and it did not cease to be such a statement because it contained a complaint and had, in the circumstances, to be recorded under section 200 of the Crimina Procedure Code.

As regards the second point, however, we are disposed to agree with the learned pleader for the appellants. A "dying declaration," as such, is not a "matter required by

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law to be reduced to the form of a document;" therefore, section 91 of the Evidence Act ought not to have been applied; and, as was held by this Court in *Empress* v. *Samiruddin* (1) in 1881, and in *King-Emperor* v. *Mathura Thakur* (2) more recently, the precise statement made ought to have been proved by the Magistrate who recorded it, or by someone who heard it. We think, then, that Ex. (1*a*), the recorded complaint, must be excluded. But there remains the statement contained in the written petition of complaint, Ex. (1), prepared by the muktear's *mohurrir* (prosecution witness No. 4), who swears that the deceased made a statement in his presence and that it was "correctly put down" in that petition. As this statement and that subsequently made to the Magistrate are practically the same, the exclusion of the latter does not affect the case.

As to the facts, the case for the prosecution is that the deceased was waylaid on the 28th May, and assaulted by the three appellants (and a fourth *namasudra*, Nanda, who appears to have absconded) out of revenge, Saheb Ali's brother, Ahab, having assaulted Girish a few days earlier on Girish's trying to impound Ahab's cattle for trespassing on his field. The scene of the occurrence was laid at a short distance from Girish's field.

The defence is that the deceased and his brother allowed their cattle to trespass on Girish's field on the 28th May, that Girish seized the cattle, and that the occurrence took place there in consequence of the intervention of the deceased and his friends. A vague counter-complaint to this effect was lodged by Girish on the 29th, and witnesses were produced at the trial to develop it. According to them the absconder, Nanda, and someone called Sita, came to succour Girish, and it was they *alone* who assaulted Saheb Ali. Girish was present, but took no part in the assault; Gouridas and Gurudas were not there at all; and, while one witness admits that he saw blood on Saheb Ali's person, all profess to have no idea how the deceased came by his injuries.

(1) (1881) I. L. R. 8 Calc. 211. (2) (1901) 6 C. W. N. 72.

The learned Sessions Judge, for what seem to us to be very good reasons, doubted the origin of the occurrence alleged by the prosecution, and came to the conclusion that it took place, as suggested by the defence, on or near Girish's field owing to the trespass of Saheb Ali's cattle. That all three appellants assaulted the deceased, and that Gouridas and Gurudas both struck him on the head with *lathis*, he found fully proved, and he convicted these two of murder, inferring that they must have intended to cause bodily injury likely to result in death.

The assault and its consequences may be said to be admitted, and we agree with the learned Sessions Judge in thinking that there can be no reasonable doubt as to the three appellants having taken part in it. The evidence implicating them is ample. First, there are three eye-witnesses—Joynuddi, the deceased's youthful nephew, Buksha Ali, a cousin, and Chierag Ali, who seems to be independent and was cultivating his field in the vicinity at the time. Joynuddi was apparently not mentioned to the police by the others in the first instance, but that is not a sufficient reason for disbelieving him, especially as it is in evidence that he ran away to some distance when his uncle was attacked. Next, there is the statement made by the deceased on the following day in the presence of the *mohurrir* and proved by the latter. Then there is the corroborative evidence of the Civil Hospital Assistant, showing that the deceased received six injuries, including three severe injuries on the head, one of which fractured the frontal bone and was the cause of death. The blow on the back of the head, he deposed, "would not of itself have been fatal." Finally, there is the difficulty of accepting the theory of the defence and understanding why Saheb Ali should have falsely charged Gouridas and Gurudas, instead of the absent Sita.

In the case of Girish, therefore, we see no reason to interfere and dismiss his appeal.

As regards the other two appellants there are considerations which lead us to take a view of their action different from that taken in the Court below. Only one blow was

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fatal, and the learned Sessions Judge has not been able to find who struck it. Recourse has, therefore, to be had to section 34 of the Indian Penal Code, but in the circumstances of this case we are not prepared to hold that the appellant who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck by the others in prosecution of the common object of punishing the deceased for his interference and the damage done by his cattle. Moreover, the deceased was in the wrong, and the appellant, on whose behalf the others intervened, has escaped with only three months' imprisonment. We think that the ends of justice will be fully met by convicting Gouridas and Gurudas under section 326 of the Indian Penal Code, and sentencing each to seven years' rigorous imprisonment.

The Sessions Judge seems to have held that the proviso to section 162 of the Code of Criminal Procedure debarred the prosecution from proving by oral evidence a previous statement made to the police by one of the witnesses for the defence in order to impeach that witness' credit. It is not necessary for us to discuss the question thus raised here, especially as we have just had occasion to deal with it in *Fanindra Nath Banerjee* v. *Emperor* (1).

(1) (1908) I. L. R. 36 Calc. 281.

E. H. M.