

## APPELLATE CRIMINAL.

*Before Jenkins C.J. and Sharfuddin J.*NAWAB<sup>o</sup> HOWLADAR*v.*

EMPEROR.\*

1913

May 23.

*Evidence—Evidence Act (I of 1872), s. 122—“ Representative in interest ”  
—Disclosure by wife of communications made by deceased husband  
during marriage.*

Where there is no “ representative in interest ” who can consent, under s. 122 of the Evidence Act, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications.

The widow of a deceased husband is not his “ representative in interest ” for the purpose of giving such consent.

THE four appellants and others were tried before the Additional Sessions Judge of Bakarganj, with the aid of Assessors, on charges under section 302 read with section 34 and section 460 of the Indian Penal Code, and the appellants were found guilty thereunder, and sentenced, under section 302 read with section 34, to death.

It was alleged by the prosecution that the murders had been committed by a party of persons consisting, among others, of the appellants and one Hamju. The latter a few days after the murder committed suicide, leaving a widow, Jaytun Bibi, and an infant daughter aged four years. It was also alleged by the prosecution that, prior to committing suicide, Hamju had made certain statements, implicating the appellants in the murders, to his wife Jaytun. The prosecution sought to prove these statements under section 32 (3) of

Criminal Appeal No. 329 of 1913, against the order of S. K. Ghose, Additional Sessions Judge of Bakarganj, dated March 25, 1913.

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the Evidence Act, and examined Jaytun as a witness, who freely deposed to the statements made to her by Hamju. An objection was taken by the defence that these statements were inadmissible under section 122 of the Evidence Act. The Additional Sessions Judge, however, overruled the objection, and admitted the statements. On appeal, it was contended, *inter alia*, that the statements should not have been admitted in evidence.

*Mr. K. N. Chaudhuri* (with him *Mr. Surita* and *Babu Brojendra Nath Chatterjee*), for the appellants, submitted that the statements being communications made during marriage, the widow should not, under section 122 of the Evidence Act, have been permitted to disclose them, even if she was willing to do so.

*The Offg. Deputy Legal Remembrancer (Mr. C. E. Bagram)*, for the Crown. The evidence was properly admitted, inasmuch as the widow was a willing witness, and she is the deceased's representative in interest.

[JENKINS C.J. No, she is not. There is no representative in interest here.]

It is submitted that if there is no representative in interest, no question of consent can arise; and there being no one whose consent could be obtained, the statements are admissible, if the widow is a willing witness, without consent.

*Cur. adv. vult.*

JENKINS C.J. The four appellants, Nawab Howladar, Zaban Ali, Abdul Malla and Araz Ali Sikdar, have been convicted under sections 302 and 460 of the Indian Penal Code, and sentenced to death under the former section. In convicting the accused the Sessions Judge agreed with both the Assessors.

From this conviction and sentence the present appeal has been preferred, and the proceedings have been submitted for confirmation of sentence.

Both sides of the case have been placed before us with care and skill by Mr. Chaudhuri for the defence and Mr. Bagram for the prosecution, and we have been much assisted by their arguments.

The story of the crime may be briefly told. On the night of Wednesday, 6th November last, two men, three women and a little girl were murdered at Rajar Char in the house of Osimuddi, one of the victims. They were the sole inmates of the house at the time, and so the crime was not discovered until the following morning.

There can be no doubt that it was the work of more than one culprit, and the case for the prosecution is that it was committed by a party of men of whom the present appellants were some. Plunder was apparently not the motive.

Of the appellants, two confessed before a Deputy Magistrate, but they subsequently retracted their confession. The prosecution seek also to rely on the statements ascribed to Hamju, an alleged member of the party, who has since died by his own hand.

Over and above this there is the medical evidence and the testimony of witnesses, who speak to the enmity of the appellant Nawab Howladar towards the murdered man Osimuddi, of witnesses who depose to having seen or heard some of the appellants that night in circumstances which, according to the prosecution theory, point to their presence in the neighbourhood of the crime, of the police officers who investigated the crime, and of an eye-witness, and so forth.

This eye-witness is an approver named Abdul Karim Sardar. His evidence is strongly attacked,

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and, apart from the criticism to which the evidence of all approvers is open, it is urged that the story of Abdul Karim is manifestly false.

I will first deal with statements attributed to Hamju by his widow Jaytun Bibi.

It was contended before the Sessions Judge, and the contention has been repeated here, that the widow's disclosure of these communications should not have been permitted by the Court. The Sessions Judge, however, overruled the objection on grounds which appear to me to be in complete disregard of the language of section 122 of the Evidence Act on which the defence relied.

The statement to which Jaytun deposed was a communication made to her during marriage by a person to whom she had been married. Not only, therefore, could she not be compelled to disclose that communication, but she should not have been permitted to disclose it, for there was no one who did or could consent to the disclosure. The prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax. Jaytun's disclosure, therefore, of Hamju's communications must be excluded from consideration.

[His Lordship then dealt with the rest of the evidence, and concluded :—]

As against Zaban Ali and Abdul Malla, the convictions and sentence must be reversed, and they must be acquitted and set at liberty. As against Nawab Howladar and Araz All Sikdar, the convictions must stand, and in each case we confirm the sentence of death.

SHARFUDDIN J. I agree.

C. E. B.