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(1880) 01 AHC CK 0014

Allahabad High Court

Case No: None

Empress of India — APPELLANT

Vs

Mulu — RESPONDENT

Date of Decision: Jan. 19, 1880

Citation: (1880) ILR (All) 646

Hon'ble Judges: Straight, J

Bench: Single Bench

Judgement

Straight, J.

I had at one time the intention of disposing of the case in its present condition, but upon carefully going over it I feel that to do so would be to countenance an irregularity of procedure that ought not to be passed over. I refer to the reading of the deposition of Ganga Prasad in the Sessions Court to prove the loss and identity of the articles found in the possession of the accused. It was absolutely inadmissible u/s 249 * of the Criminal Procedure Code, and there is no evidence upon the record, nor do I believe was there any taken, to permit the application of Section 33 of the Evidence Act. As to Section 249, * that has no applicability to a case like the present, and is intended to provide for the contingency, that may arise, when a witness, who is produced before the Court of Session holds back information and evidence and tells a different story to that which he gave in the preliminary inquiry before the Magistrate. With regard to s. 33 of the Evidence Act it is true that it makes a statement "given by a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states," in the following emergencies: (i) When the witness is dead: (ii) When he cannot be found : (iii) When he is incapable of giving evidence: (iv) When he is kept out of the way by the adverse party: (v) When his presence cannot be obtained without an amount of delay or expense which under the circumstances the Court considers unreasonable. But in my opinion it was intended that the provisions of the section as to emergency (v) were only to be sparingly applied, and certainly not in a case like the present, where the witness was alive and his evidence reasonably procurable. Assuming, however, that there were reasons why the Court of Session thought fit to

dispense with Ganga Prasad''s personal attendance, and circumstances were disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should have been formally and regularly taken and recorded. It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and there is an entire absence, as far as I can see in this case, of anything to establish those grounds for applying Section 33 of the Evidence Act. The reading of the evidence of Ganga Prasad as given by him in the Magistrate''s Court was therefore irregular and improper. I further remark in his judgment that the Sessions Judge has allowed his decision to be influenced by the statement of Deodat, and that u/s 30 of the Evidence Act he has '' taken it into consideration'' against the two other accused. In this respect I think he was also in error. The account of the transaction given by Deodat is in no sense a confession, on the contrary he deprecates altogether any guilty knowledge, and seeks to clear himself at the expense of his co-prisoners. The case of Queen v. Belat Ali 10 B.L.R. 453 deals very fully with this point, and I have also myself had at some little length to discuss it in the case of Empress v. Ganraj ILR 2 All. 444. Therefore the statement of Deodat should have had no weight against Mulu or Khilla.

2. Much as I regret to have to do so I must send this case back for further inquiry before the Sessions Judge without the assessors, such inquiry to be conducted in the presence of the three accused, who are to be afforded every opportunity for cross-examination, and the further proof is to be directed to establish the loss of the several articles and their identity by Ganga Prasad. In addition to this I desire fuller evidence of what was said by Mulu and Khilla, each individually, as to the property found in the well both before and at the time of its being found, whether both or which of them went down the well, and what the date was on which Mulu gave any intimation that he could restore some of the property. When this evidence has been taken it must be returned certified to the Court, which will then proceed to dispose of the appeal.

*Evidence given at the preliminary inquiry admissible.

[Section 249 :--When a witness is produced before the Court of Session, or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and the Court may, if it thinks fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith.

Explanation.--This section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under that Indian Evidence Act or other law in force for the time being upon the subject of evidence.]