

(1881) 03 CAL CK 0012

Calcutta High Court

Case No: None

In Re: Rochia Mohata

 The Empress

APPELLANT

Vs

RESPONDENT

Date of Decision: March 25, 1881

Acts Referred:

- Evidence Act, 1872 - Section 33

Citation: (1881) ILR (Cal) 42

Hon'ble Judges: Pontifex, J; Field, J

Bench: Division Bench

Judgement

Pontifex, J.

This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some error of law or misdirection by the Judge. Now it is alleged that we ought to interfere on two grounds, first, that evidence has been wrongly placed before the jury; and secondly, that in certain particulars there has been a misdirection, or rather a want of direction by the Judge.

2. With respect to the first ground that improper evidence has been placed before the jury, the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution and used in the Sessions Court under the following circumstances:

3. One of these witnesses was the person whom the defendant and his party were accused of assaulting, and who has since died. Now, before the Magistrate the only complaint was a charge of grievous hurt. But in consequence of the death of the person who was hurt, viz., Khedroo, other charges were added before the Sessions Judge,---viz., a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, u/s 33 of the Evidence Act, the questions in issue before the Sessions Court, and before the

Magistrate, were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt; and therefore the issue that was before the Magistrate was the only issue that has been decided against the accused by the jury. It appears to us, that, by "the questions in issue," referred to in Section 33, being required to be "substantially the same," it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible u/s 33, and even if it were not admissible u/s 33, that it would be admissible under the first clause of Section 32 of the Evidence Act. The question whether the proviso to Section 33 is applicable,-that is, whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted u/s 33.

4. With respect to the other deposition which was put in and read before the Sessions Court, it appears that a person named Jan Ali, alleged to be the gomasta of the ticcadar, was examined before the Magistrate, and that he lived in the cutcherry-house. A summons was properly taken out to be served on Jan Ali at the cutcherry-house; but the peon in his return stated that as he was unable to find Jan Ali and serve him personally, he hung up the summons on the cutcherry-house. There is also evidence to show that Jan Ali suddenly disappeared from the cutcherry-house. It is further shown that inquiry was made in his native village whether he had returned there; but the result of the inquiry was that nothing had been heard of him. It was therefore impossible to say where Jan Ali was or to serve him with a summons. We think, under these circumstances, that his deposition was properly usable u/s 33 before the Sessions Court; and it does not appear that any objection was made before the Judge to its admission. We find on the record no petition or memorandum showing that objection was made when the deposition was read; but we do find that, on the part of the defendant himself, the deposition before the Magistrate of one of his own witnesses was put in and was used as evidence. We think, therefore, that both these depositions were properly admitted by the Judge to be used as evidence in this case.

5. We then come to the next ground before us, that there has been a misdirection by the Judge, or rather a want of sufficient direction to the jury. It is alleged that many matters were not mentioned by the Judge in his charge which ought to have been brought to the notice of the jury; and, in particular, stress was laid on the fact that the Judge made no reference whatever to the evidence of the witnesses for the

defence. We asked that the evidence of the witnesses for the defence should be read to us, and it has been read to us, and we have no hesitation in saying that the Judge, by making no reference to it in his charge to the jury, acted favourably rather than otherwise towards the prisoner. For, if reference had been made to that evidence, it would at the same time have been necessary to point out to the jury that the witnesses were not in accord with one another; that their statements were discrepant; and that the evidence of the principal witness, who is now relied upon for the defence, was really unreliable.

6. Moreover, we know that the prisoner was defended by counsel in the Court below; and although particular points may not have been alluded to in the Judge's charge to the jury, we have little doubt that they were made, and properly made, much of by the defendant's counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

7. There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

8. The Judge was not satisfied that the grounds were sufficient; nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

9. Under the circumstances, we must dismiss this appeal. The conviction and sentence will stand.