
(1874) 05 CAL CK 0003

Calcutta High Court

Case No: Criminal Appeal No. 201 of 1874

The Queen

APPELLANT

Vs

Mussamut Itwarya

RESPONDENT

Date of Decision: May 9, 1874

Final Decision: Allowed

Judgement

Kemp, J.

This prisoner has been convicted under s. 307 of the Indian Penal Code, and has been sentenced to transportation for ten years. The trial was by jury. The points taken are, first, that the Judge was wrong in not permitting the jury to refer to the evidence in a case in which this prisoner was committed for an offence under s. 302, and of which she has been acquitted, inasmuch as the evidence in both trials is the same, and refers to the same occurrence and to the same party accused; second, that the evidence of the witness Ramkoori is not legal evidence as s. 118 of the Evidence Act does not obviate the necessity of, an oath or solemn affirmation. Another point of law has been taken before us by the learned Counsel who appears for the prisoner, namely, that no preliminary enquiry was held by the Joint Magistrate with reference to the charge of an offence under s. 307, that the prisoner, was not put upon her defence upon that charge, and that she has been prejudiced by this irregularity in the procedure, inasmuch as she had no opportunity of cross-examining the witnesses on this charge, and has been deprived of the benefit of testing the accuracy of their evidence by comparing their depositions in the Sessions Court with the evidence which they gave before the Joint Magistrate.

2. With reference to the objection taken as to the inadmissibility of the evidence of the girl Ramkoori, under s. 15 of Act II of 1855, the old evidence law, this evidence would have been admissible. S. 15 enacts that "any person who, by reason of immature age, or want of religious belief, or who by reason of defeat of religious belief, ought not, in the opinion of the Court, to be admitted to give evidence on oath or solemn affirmation, shall he admitted to give evidence on a simple affirmation, declaring that he will speak the truth,

the whole truth, and nothing but the truth." Now in this case Ramkooori is a child of immature age; she has been examined on simple affirmation/and her evidence would have been admissible under Act II of 1855. We have now to consider whether under the new law her evidence is admissible. Under s. 118 of the Evidence Act, this little girl is a competent witness, for the Court below has considered that she understood the question put to her, and was able to give rational answers to those questions. But it has been contended that, although she is a competent witness, her statement is inadmissible, inasmuch as it is not a statement on oath or solemn affirmation, and we have been referred to Act X of 1873. S. 5 enacts that oaths or affirmations shall be made by the following persons, namely, "all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence." The learned Counsel, therefore contends that inasmuch as this girl has not been examined on oath or solemn affirmation, her evidence is inadmissible; but under s. 13 of the same Act, it is enacted that "no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." Now it is clear that in this case, the Sessions Judge being of opinion from the answers given by this little girl that she was not aware of the responsibility of an oath, examined her on simple affirmation. Therefore the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge, and it cannot be said that because the omission was knowingly made, it renders the evidence inadmissible under s. 5, for section 13 says that no omission of any kind, whether made knowingly or otherwise, shall render the evidence of a witness inadmissible. We, therefore, do not think, on the first point, that the child's evidence was inadmissible, and the Judge has properly left the amount of credibility to be attached to her evidence to the consideration of the jury.

3. Then with reference to the second point,--namely, that the Judge ought to have allowed the jury to refer to the evidence of the former trial for murder in which this prisoner was acquitted,--we observe that the Judge in his charge to the jury remarked "that that case was not before them, and that they must be governed solely by the evidence in the case before them," that is the present case in which the prisoner is charged with an offence under s. 307. With reference to this point we would refer to the remarks made by the late Chief Justice, Sir Barnes Peacock, in the case of the Queen v. Dwarkanath Dutt 7 W.R. Cr., 15; see p. 11, to the effect that a Court before which a second trial is held has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same, the former convictions or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence

given in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding that the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence or a different Court, is bound to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction. Now in this case, it is clear that the offence is not the same on which the prisoner Itwarya had been committed on a charge of murder of the boy Juggernath under s. 302. In the present case, she is committed on a charge of attempting to murder the girl Ramkoori under s. 307; and, therefore, we do not think that the Judge was wrong in that part of his charge to the jury.

4. Then we come to the third point, and we think that there must be a retrial for the following reasons:--On the 31st December 1873, the Officiating Joint Magistrate of Patna drew up a charge against the prisoner Itwarya charging her with the murder of Juggernath under s. 302, the prisoner was called upon to enter upon her defence, she did so, and on the same day, namely, on the 31st of December, a charge was drawn up, and she was committed on that charge alone, and she was acquitted of that charge on the 6th of February. On the 7th of February we find that the Magistrate adds the following remarks to his former judgment or reasons of committal, viz., "Mussamut Itwarya is also committed to take her trial before the Sessions Judge on a charge of attempting to murder the Girl Ramkoori under s. 307." The prisoner Itwarya was not put upon her defence, no witnesses were examined with reference to the second charge under s. 307, and all that was done was to ask her on the 7th of February whether she wished to examine any further witnesses before the Sessions Judge, on which date she intimated that she did not require any further witnesses to be sent for, but would examine the witnesses she had already named on the former charge. Now, under s. 283 of the Code of Criminal Procedure, no finding or sentence passed by a Court of competent jurisdiction can be reversed or altered on appeal on account of any error or defect either in the charge or in the proceedings on or before the trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in a charge to a jury, unless such error or defect has occasioned a failure of justice either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence. Now in this case it is clear that the procedure in the Joint Magistrate's Court has prejudiced the prisoner in her defence; she has not had the opportunity which she ought to have had of cross-examining the witnesses, and in this case there were none examined in the matter of the charge made against her under s. 307. We therefore think that looking to the irregularity in the proceedings of the Joint Magistrate in this case, the trial of the prisoner Itwarya on a charge under s. 307 of the Indian Penal Code must be quashed. The Joint Magistrate will be directed to hold a preliminary enquiry according to law, giving the prisoner an opportunity of cross-examining the witnesses who may be adduced in support of the charge under s. 307, and if he is satisfied with that evidence, he can recommit her to take her trial in the Sessions Court. The Magistrate will be directed to proceed at once with the new trial (1).