CALCUTTA HIGH COURT

Nafar Sheikh

Vs

Emperor

(Mookerjee and Beacheroft, JJ.)

28.07.1913

JUDGMENT

Mookerjee, J.

1. The appellant, Nafar Sheik, has been convicted of an offence under Section 376, read with Section 511 of the Indian Penal Code, and sentenced to rigorous imprisonment for five years. The jury unanimously found him guilty, but recommended a light sentence on the ground that he is a young man and has got a young wife. The Sessions Judge accepted the verdict of the jury, but did not give effect to their recommendation for a light sentence. The appeal to this Court was in the first instance admitted by Harington and Coxe JJ., for consideration of the sentence only, in view of the representation of the jury. The appeal thus admitted came to be heard by the Chief Justice and Sharfuddin J., who held that, in view of the provisions of Section 422 of the Criminal Procedure Code, 1898, the appeal could not be admitted on a limited ground, and directed the scope of the order of admission to be enlarged. As the direction thus given was not formally recorded, it is desirable to draw attention to the terms of Sections 421 and 422 of the Criminal Procedure Code. Sub-section (2) of Section 421 lays down that on receiving the petition of appeal, accompanied by a copy of the judgment or order appealed against or a copy of the heads of the charge in cases tried by a jury, under Section 419 or Section 420, the Appellate Court shall peruse the same and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. Section 422 then provides that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the ground of appeal. It is plain that the appeal which has thus to be heard is the whole appeal; consequently, all the grounds taken in the petition of appeal are open for consideration at the final hearing, and the appellant cannot be restricted to any selected ground out of those specified in his petition. A restrictive order for admission is clearly not contemplated by Section 422 and must be deemed ultra vires. This view is strengthened by a consideration of the terms of Section 423. It is worthy of note that a similar view has been taken by this Court with regard to appeals under the Civil Procedure Code: *Lukhi Narain Serowji v. Sri Ram Chandra* [1] Fresh notice of the appeal has been given to the Crown, and the appeal has been argued before us on behalf of the accused and the Crown.

2. The verdict of the jury has been assailed on behalf of the appellant as erroneous by reason of

three circumstances, namely, first, that the Sessions Judge has allowed to be placed before the jury the evidence of three persons who had not made an affirmation as required by Section 6 of the Indian Oaths Act, 1873; secondly, that the Sessions Judge has not considered; whether these three persons were, by reason of their tender years, prevented from understanding the questions put to them or from giving rational answers to those questions, within the meaning of Section 118 of the Indian Evidence Act, 1872; and, thirdly, that the Sessions Judge has failed to call the attention of the jury to material portions of the evidence.

3. In support of the first ground, reliance has been placed upon Sections 5 and 6 of the Indian Oaths Act. Section 5 provides that oaths or affirmations shall be made by 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 by person having by law or consent of parties authority to examine such persons or to receive evidence. Section 6 provides that where the witness is a Hindu or Mahomedan, he shall, instead of making an oath, make an affirmation. In the case before us, the complainant Jobeda, a girl six years old, and two other girls, Haliman and Moula, each four years old, were examined, though they did not make an affirmation. In fact, the Sessions Judge deliberately did not give them an opportunity to make an affirmation. The Judge appears to have assumed, without investigation, that the children were of so tender an age that they could not appreciate the value and significance of an affirmation. It is plain that the Judge should not have adopted this course. As was laid down in the case of *King v. Brasier*[2] an infant, even though under the age of seven years, may be sworn, in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; in other words, a Court has to ascertain from the answers to questions propounded to such a witness, whether he appreciates the danger and impiety of falsehood. The course pursued by the Sessions Judge has led to the result that these witnesses were examined in contravention of the provisions of Section 6 of the Indian Oaths Act. On behalf of the Grown, however, it was suggested that the irregularity in the proceeding, if any, may be shown, if necessary, to have been cured by the provisions of Section 13 of the Indian Oaths Act. Section 13 lays down that no omission to make any affirmation shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. In support of this view, reliance has been placed upon the decision of a majority of the Fall Bench in *Queen v. Sewa Bhogta*[3] On behalf of the appellant, this position has been controverted, and it has been argued that, where there is an omission by a witness to take an oath or to make any affirmation by reason of the deliberate act of the Court, Section 13 is of no assistance. The question raised is by no means free from difficulty, as is amply indicated by the divergence of judicial opinion on the subject. In this Court, judicial opinion has not been uniform, as appears from an examination of the decisions in Queen v. Mussumat Itwarya (1874) 14 B.L.R. 54; 22 W.R. Cr. 14. Queen v. Anunto Chuckerbutty (1874) 14 B.L.R. 295 Note; 22 W.R. Cr. 1 and Queen v. Sewa Bhogta (1874) B.L.R. 294; 23 W.R. Cr. 12. It is further worthy of note that in the case of Nundo Lal Bose v. Nistarini Dassi (1900) I.L.R. 27 Calc. 428, 440 when it was argued on the authority of some of the decisions just mentioned that Section 13 of the Indian Oaths Act applied to cases where the omission to take the oath or affirmation was the result of the deliberate act of the Court or of the witness, Sir Francis Maclean, C.J., with the concurrence of Mr. Justice Macpherson and Mr. Justice Hill, described the contention as at once novel and startling. There has been a similar divergence of judicial opinion in the other High Courts as is indicated by the cases of *Queen-Empress v. Maru* [4] *Queen-Empress v. Lal Sahai* [5]*Queen-Empress v. Shava*[6] and *Queen-Empress v. Viraperumal*[7] In view of this divergence of judicial opinion and of the course

we propose to take with regard to the second ground urged by the appellant, I reserve my opinion upon the difficult question of the true scope and effect of Section 13 of the Indian Oaths Act.

4. In support of the second ground, it has been contended that the record makes it reasonably clear that the Sessions Judge has not considered, whether the three girls mentioned, were, by reason of their tender years, prevented from understanding the questions put to them, or from giving rational answers to those questions. It has further been argued that, under Section 118 of the Indian Evidence Act, he was bound to ascertain, before these children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Sheikh Fakir v. Emperor*[8] which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such, a witness, before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement; but, in my opinion, the proposition thus widely formulated is not justified by the terms of Section 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must, by a preliminary examination, test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness, before the actual examination commences. In fact, the case of *Queen v. Whitehead*[9] shows that the incompetency of a witness may very well appear in the course of his examination-in-chief, and that the evidence of a witness so found to be incompetent may at that stage be withdrawn from the jury. The true rule on the subject is concisely stated by Bremer, J. in *Wheeler v. United States*[10] in these terms: "The decision of this question (whether the child-witness, has sufficient intelligence) primarily rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession of lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed on review, unless from that which is preserved, it is clear that it was erroneous." The mere circumstance that the Sessions Judge did not interrogate the witnesses, before their examination began, with a view to test their capacity, does not, in the view I take of the true effect of Section 118 of the Indian Evidence Act, invalidate the trial. But, in the present case, there are circumstances which, in my opinion, rendered it plainly desirable that such a course should have been pursued. In the first place, with regard to the girl Moula, the committing Magistrate had recorded the note that she was too young to make any rational statement, and, on this ground he did not receive her testimony. In the second place, as regards the girl Jobeda, the committing Magistrate had recorded the note that "she can hardly give rational answers to questions put to her." It farther appears from the record that on the first day that Jobeda was examined before the Magistrate, she could not answer the questions put to her, though, on the day following, she gave full answers. In the third place, as regards all the three girls, Haliman, Moula and Jobeda, the Sessions Judge deliberately omitted to follow the procedure prescribed by Section 6 of the Indian Oaths Act; from this circumstance the accused has invited us to draw the inference that, in the opinion of the Judge, the children were of too tender an age to be able to appreciate the distinction between truth and falsehood and the significance of an affirmation. The record of the Sessions Judge, as already stated, does not throw any light on these points, and

there is nothing to show that his attention was drawn to the remarks made by the committing Magistrate or that the provisions of Section 118 of the Indian Evidence Act were present to his mind. Under these circumstances, I am of opinion that it would not be safe to affirm the conviction. I am not unmindful that the Sessions Judge did invite the attention of the jury to the circumstance that the girls had not made an affirmation: this observation was, however, made, not with a view to exclude their testimony but with a view to make the jury consider the question of the weight to be attached to their evidence. The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury, although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such witness: *Queen v. Hosseinee*[11] The second ground urged by the appellant must consequently prevail. In this view, it is unnecessary to consider the third ground in detail, though I must state that I was not impressed by it.

5. The result is that this appeal is allowed, the conviction and sentence set aside, and the case remitted to the Sessions Judge to be re-tried in accordance with law. The three girls mentioned must be examined in conformity with the provisions of Section 6 of the Indian Oaths Act, and Section 118 of the Indian Evidence Act. It may be usefully added that children of six or even five years of age have been allowed to testify, upon the Court being satisfied as to their capacity to give rational testimony: *Reg. v. Holmes* [12]*Beg. v. Perkins*[13] *King v. Brasier*[14]

Beachcroft, J.

6. I agree that the conviction should be set aside and a re-trial ordered on the ground that it is not clear that some of the evidence, and that the most important evidence, was admissible. The remarks of the Magistrate regarding the children Moula and Jobeda raise a doubt as to their competency to testify; and as the learned Judge does not appear to have considered the question from the point of view of Section 118 of the Evidence Act, the conviction has been based on evidence the admissibility of which is doubtful.

7. I respectfully dissent from the dictum in Sheikh Fakir v. Emperor (1909) 11 C.W.N. 51 that the Judge must form his opinion as to the competency of a witness before his actual, examination commences. In many cases it may be desirable to take that course, but to lay it down as a positive rule of law is to read words into Section 118 of the Evidence Act which are not there.

8. In my opinion, the question whether a witness understands the nature and obligations of an oath or affirmation is foreign to the question of competency to testify. Intellectual capacity is the only test. But the Judge was bound under the provisions of the Oaths Act to have an affirmation made by the witnesses. The effect of the omission in this instance it is necessary to discuss.

9. In regard to the arguments as to misdirection, I desire to refer only to one point. It was argued that the Sessions Judge in his charge to the jury had not pointed out to them that the medical evidence was consistent only with a case of attempted rape and, therefore, contradicted the evidence of the girl. This reading of the medical evidence depends on the view that vaginal penetration is necessary to complete the offence of rape. The extent of penetration required has not been defined in the Indian Penal Code, but it is open to argument whether vulval penetration, with which the medical evidence is consistent, is not sufficient to establish rape and whether the accused ought not in this case to have been committed on a charge of the completed offence and

not on a charge of attempt only. I express no opinion on this point for it was not argued before us.

Cases Referred.

1(1911) 15 C.W.N. 921
2(1779) 1 Leach 237
3(1874) B.L.R. 294; 23 W.R. Cr.12
4(1888) I.L.R. 10 All. 207
5(1888) I.L.R. 11 All. 183
6(1891) I.L.R. 16 Bom. 359
7(1892) I.L.R. 16 Mad. 105
8(1906) 11 C.W.N. 51
9(1866) L.R. 1 C.C.R. 33
10(1895) 159 U.S. 523
11(1867) 8 W.R. Cr. 60
12(1861) 2 F. & F. 788
13(1840) 2 Moo. C.C. 135
14(1779) 1 Leach 237