Present : Mr. Justice Wendt and Mr. Justice Grenier.

1905. October 31.

REX *v.* RAHIMAN *et al.*

P. C. Mannar, 2,705.

Deposition as witness—Proof of deposition—Admissibility on trial of witness for the same offence—Confession—Evidence Ordinance, s. 132—*Criminal Procedure Code, ss.* 155, 298, *and* 302.

M L was examined as a witness in a case in which one A R was charged with certain offences, and gave evidence implicating himself and A R. Subsequently, M L was made an accused in the same case and the deposition made by him as a witness was read in evidence at his trial.

Held, that the deposition was rightly admitted in evidence under section 132 of the Evidence Ordinance.

Held, also, that it was unnecessary to call the Police Magistrate to prove the deposition.

CROWN CASE RESERVED.

THE case stated by WOOD RENTON J., for the consideration of the Court was as follows:—

1. "At the Colombo Criminal Sessions, held before me on 17th instant, two men, Abdul Rahiman and Mira Lebbe, with three others whose names are immaterial, were tried on charges of criminal trespass, robbery, voluntary infliction of hurt, and—as an alternative to the charge of robbery—abetment of robbery.

2. The jury unanimously convicted both prisoners of criminal trespass and robbery. I withdrew from the jury the charge of abetment.

3. In support of the charges against Mira Lebbe, the Crown tendered in evidence a deposition given by him before the Police Court of Mannar held at Marichchukaddi, in which he clearly implicated both himself and Abdul Rahiman. At the time when the deposition was given, Abdul Rahiman was actually charged with the offences in question. There was then no charge against Mira Lebbe; he came forward voluntarily and, after having been duly affirmed, gave evidence in the Police Court proceedings. His deposition purports to have been signed by him, after it had been read over to him in the presence of Abdul Rahiman, the accused. Moreover, the record shows that the witness Mira Lebbe was cross-examined by Abdul Rahiman on that very deposition. I should add that Mira Lebbe's deposition was offered by the Crown as evidence against himself alone, and that I directed the jury to exclude it from their consideration in dealing with the case against Abdul Rahiman.

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4. Mr. Senathi Rajah, counsel for Mira Lebbe and Abdul Rahiman, objected to the admission of this evidence upon any ground; and contended, further, that, even if it were admissible, it was necessary that the Police Magistrate, before whom it was taken, should be called as a witness for the purpose of proving that Mira Lebbe's statements were made in the presence of the accused.

5. In support of his first contention (that the deposition was entirely inadmissible) Mr. Senathi Rajah referred to section 155 of the Criminal Procedure Ordinance, which prescribes the steps to be taken where a magistrate receives a statement from an accused person, and section 33 of the Evidence Ordinance, which defines the circumstances that make evidence given by a witness in a former judicial proceeding relevant when such witness is not available in subsequent judicial proceedings.

6. I held that these sections had no bearing on the present case, where the question at issue was the admissibility of a statement made, not by an accused person, but by a witness who in the subsequent judicial proceedings in which it is tendered is an "accused person," and I admitted the evidence under section 132 of the Evidence Ordinance, as interpreted in *R. v. Cadermen* (1), *R. v. Gopal Doss* (2), *Queen Empress v. Ganu Sonba* (3), *Queen Empress v. Sami Appa* (4). In this last case the previous judicial proceedings were criminal and not civil, so that it presents a complete analogy to the present case.

7. In support of this alternative contention (that the magistrate ought to have been called to prove that Mira Lebbe's deposition was made in the presence of Abdul Rahiman), Mr. Senathi Rajah cited section 80 of the Evidence Ordinance, and the following Indian authorities: *Queen Empress v. Riding* (5), *Queen Empress v. Poph Singh* (6), *Kachali Hari v. Queen Empress* (7).

8. I held that, even if these authorities did, as they do not, relate to the admission of depositions under section 132 of the Evidence Ordinance, they show that the deposition of Mira Lebbe was admissible without any necessity for the magistrate being called as a witness. The evidence was admitted against Mira Lebbe alone; and, even assuming that it was admissible against Abdul Rahiman, it appeared on the face of the record that he not only was present when it was given, but had subjected it to cross-examination.

9. The questions for the consideration of the Full Court are these:—

(1) Was I right in holding that the deposition referred to in paragraph 3 was admissible?

(1) 6 *N. L. R.* 67.
(2) *I. L. R.* 3 *Mad.* 271.
(3) *I. L. R.* 12 *Bom.* 440.
(4) *I. L. R.* 15 *Mad.* 63.
(5) *I. L. R.* 9 *All.* 720.
(6) *I. L. R.* 10 *All.* 174.
(7) *I. L. R.* 18 *Cal.* 129.

(2) Was I right in holding that it was unnecessary, under the circumstances stated in paragraph 3, that the Police Magistrate should be called as a witness? '

Senathi Rajah, for the accused.

Van Langenberg, A. S.-G., for the Crown.

Cur. adv. vult.

31st October, 1905. The Court (WENDT and GRENIER JJ.), delivered the following judgment:—

The facts material to the decision of the two questions which have been submitted for our consideration are fully stated in the case reserved by Mr. Justice Wood Renton. The first question is whether the learned Judge was right in holding that the deposition referred to in paragraph 3 was admissible. The deposition was made by the prisoner Mira Lebbe, and the Crown tendered it in evidence against him. The prisoner's counsel objected to the admission of this evidence upon any ground. We are of opinion that the deposition was rightly admitted under section 132 of the Evidence Ordinance as interpreted in the cases cited by the learned Judge in the case reserved. The argument before us by the learned counsel for the appellant proceeded on the erroneous assumption that the deposition made by Mira Lebbe was in the nature of a confession by an accused person, and that the magistrate had not followed the procedure prescribed in section 155 of the Criminal Procedure Code. That section refers to statements made by an accused person who is brought before the Police Court charged with an offence triable by a higher Court. Section 155 requires the magistrate to state to the accused the nature of the offence of which he is accused, giving such particulars as are necessary to explain the same, and to address him in certain words which are set out in the section. By sub-section 2 of section 155 any statement made by the accused shall be recorded in manner provided by section 302, which requires that after the statement has been duly recorded, the magistrate shall certify under his own hand that it was taken in his presence and hearing, and contains accurately the whole of the statement or examination of the accused. Sub-section 3 of section 302 requires that the accused shall sign or attest by his mark such statement or examination, and in the event of his refusing to do so the magistrate shall record such refusal.

Now, the proceedings in the Police Court show that Mira Lebbe appeared before the magistrate before any charge was made against him, and voluntarily, without the slightest attempt at compulsion on the part of the Court, gave evidence implicating both himself and the prisoner Abdul Rahiman. As found by the learned Judge—and the

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record fully supports his finding—at the time that Mira Lebbe made his deposition as a witness, Abdul Rahiman was actually charged with the offences in question, and he cross-examined Mira Lebbe just in the same way as an accused person would cross-examine any witness for the prosecution. At this stage, although Mira Lebbe had made certain statements implicating himself, he was not made an accused, but was regarded as a witness who had come forward voluntarily to give evidence for the prosecution. He was made an accused at a much later stage. The deposition of Mira Lebbe was properly recorded by the magistrate. It was signed by him and read over to him in the presence of Abdul Rahiman; the only accused then before the Court, and the requirements of the Criminal Procedure Code so far as they relate to the manner in which the deposition of a witness should be taken have been fully complied with (see section 298). Such being the case, it was unnecessary for the Crown to call the Police Magistrate as a witness in order to prove that Mira Lebbe's depositions were properly taken. This disposes of the second question reserved for our consideration.

In our opinion the learned Judge ruled rightly on both the questions reserved, and the conviction must therefore be affirmed.