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Abbas Mandal and ors. Vs. Emperor

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Court : Kolkata

Decided On : Aug-27-1930

Reported in : AIR1931Cal473

Appellant : Abbas Mandal and ors.

Respondent : Emperor

Judgement :

1. The three appellants have been convicted under Sections 366 and 376, I. P.C. by the unanimous verdict of the jury and sentenced to various terms of imprisonment. The only point taken in this appeal, and which seems to us to be the only point arguable, is that the learned Sessions Judge was wrong in admitting in evidence under Section 33, Evidence Act, the depositions of P. W. Tanu Molla recorded by the committing Magistrate. In that deposition Tanu said that an extra judicial confession was made by the second accused Arshad Mandal to him immediately after the occurrence implicating all the other accused. It is contended that the prosecution failed to make out grounds which would make the evidence of this witness before the committing Magistrate admissible in evidence. In the charge the learned Judge says that the evidence of this witness was admitted as he was not available. In the order sheet under order dated 20th February 1930 it is recorded:

The depositions of P.W. Tanu Molla before the committing Court are read over and put in by the prosecution (after objection by the defence).

2. The learned Judge has not either in the order sheet or in the charge discussed the circumstances under which the deposition was admitted. But on a reference to the depositions it appears that P.W. 28, the Sub-Inspector of Police, who was apparently in charge of the case, was asked as to this witness and he said this:

Since the completion of inquiry by the Magistrate even before that from 8th February 1930, witness Tanu is absconding. I searched for him on several occasions personally but could not find him.

3. This evidence, in our opinion, is sufficient to meet the requirements of law. Section 33, Evidence Act provides that evidence given by a witness in a judicial proceeding may be proved, provided certain conditions are fulfilled, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable, The evidence in this case shows that the accused 'Arshad Mandal is the brother-in-law of Tanu's son. There is the evidence of the Sub-Inspector that in spite of his endeavour he was unable to trace this witness. There is another fact which may be taken into consideration in this connexion. Tanu was examined twice in the committing Magistrate's Court: (once on 3rd September 1929 and again ion 4th November 1929. On both these occasions personal recognizance was taken from him for his appearance when (called upon; but in spite of this the witness did not appear in the Sessions Court. This confirms the evidence of the Sub-Inspector that the witness Tanu was absconding. The matter therefore comes within the words 'cannot be 'found' or 'is kept out of the way by the adverse party' in Section 33, Evidence Act. The deposition was therefore rightly admitted by the learned Judge. In his charge to the jury the learned Judge directed the jury very properly to use the evidence only as against the accused Arshad but not against any other accused persons. This ground accordingly fails and the appeal is dismissed.

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