

(1874) 12 CAL CK 0007
In the Calcutta High Court
Case No : Criminal Reference No. 598 of 1874

The Queen

APPELLANT

Vs

Sewa Bhogta

RESPONDENT

Date of Decision : 13-12-1874

Acts Referred:

Citation : (1874) 12 CAL CK 0007

Judgement

Sir Richard Couch, Kt., C.J.—We are of opinion that the word "commission," in s. 13 of Act X of 1873, includes any omission, and is not limited to accidental or negligent omissions. In this case the affirmation was in fact omitted to be made, although it was done deliberately and under the direction of the Judge. The intention appears to have been to provide for every omission, substitution, or irregularity. There is therefore no objection to the validity of the conviction, but under the circumstances, and considering the evidence in the case, we think the sentence of death should not be confirmed. Instead thereof we pass a sentence of transportation for life.

Jackson, J.

I am unable to concur in the opinion of the majority, as I cannot take the same view of the intention of the Legislature in using the word "commission."

2. It seems to me that, in framing the 13th section of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual, by perversely or erroneously ordering that witnesses should not take an oath or affirmation. It will be borne in mind that the oath is not merely imposed in criminal cases by the Act X of 1873, but the Code of Criminal Procedure, s. 331, expressly requires that witnesses shall be examined on oath or affirmation, &c., according to the provisions, &c. It seems to me, therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness

has been examined contrary to law, and the evidence is inadmissible.

(1)Before Mr. Justice Kemp and Mr. Justice Birch.

The 20th April 1674.

The Queen v. Anunto Chuckerbutty and Others.*

Act X of 1873, s. 13--Omission to take Evidence on Oath or Affirmation.

S. 13 of Act X of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation. The prisoners were charged with abducting one Prosonno, a girl, nine years of age, from the lawful guardianship of her uncle Luckhynarain Day, for the purpose of marrying her to the prisoner Anundo Sen. Upon the trial, the evidence of the child was advisedly, and not by omission, recorded without any oath or affirmation.

The prisoner having been found guilty, and sentenced to various terms of imprisonment, appealed to the High Court.

Mr. Reily (Baboo Juggut Chunder Banerjee with him) for the appellants.

The judgment of the Court was delivered by

Kemp, J.--Anunto Chuckerbutty, Anundo Sen, Haradhun Dey, and Aduri have been convicted by the Sessions Judge of Midnapore under s. 363 of the Indian Penal Code, and the prisoners Anunto Chuckerbutty and Anundo Sen have been sentenced to four years" rigorous imprisonment, and Haradhan Dey and the female prisoner Aduri to two years" rigorous imprisonment, The Sessions Judge also finds the prisoners guilty of an offence under s. 366 of the Code, but he passes sentence under s. 363 for the offence of kidnapping.

The first point taken by the learned Counsel who appears for the prisoner is, that the evidence of the witness Prosonno, the niece of the prosecutor, or rather of the principal witness in this case Luckhynarain Dey, is not admissible, inasmuch as that evidence has not been recorded on oath or solemn affirmation. Under s. 113 of the Evidence Act, all persons are 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, extreme old age, disease, whether of body or mind, or any other cause of the same kind. This witness would come under the description of a witness of tender years, being only nine years of age, but the Judge says, that she appeared to be a very intelligent girl, and thoroughly understood what she was about when questions were put to her. Therefore, this witness would be a competent witness, although of course the amount of credence to be given to her evidence is quite another matter; but the learned Counsel further objects that although the girl is a competent witness under s. 118, yet, inasmuch as 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, should be examined on oath or solemn affirmation, the witness Prosonno ought to have been so examined. S. 13 of the Oaths Act says, 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 this appears to me to apply, for instance, to the case of a person who has made a statement which is subsequently found to be a false statement, that he shall not get rid of the obligation of stating the truth by setting up a plea that there has been an omission on the part of the Court to administer to him an oath or solemn animation. It does not appear to me that this section would render the evidence of a child nine year old, whose evidence as in this case has been advisedly, and not by omission, recorded without any oath or affirmation, admissible as evidence; but be that as it may, there is independent evidence in this case of the aunt of the child, of the uncle of the child, of two neighbours, and I may say, the statement of Aduri herself, the grand-aunt of the child, and of Haradhun Dey, who is also one of the accused before the Magistrate. (The learned Judge then went into the other evidence in the case, which in the opinion of the Court proved that the child Prosonno was white in the lawful guardianship of her uncle Luckhynarain, and during his temporary absence from home, enticed away by her grand-aunt Aduri, and married against her will, and without Luckhynarain's consent to Anundo Sen. He continued):--Looking to the time at which the offence was committed during the absence of the girl's legal guardian, and to the fact that the girl was married against her will, we think the offence a very serious one, and we are therefore not disposed to mitigate the sentence which has been passed upon the prisoners by the Sessions Judge. The appeal is rejected.

*Criminal Appeal, No. 230 of 1874, against an order of the Sessions Judge of Midnapore, dated the 19th March 1874.