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below, except that any costs paid by the appellant under the decree of the Appellate Court should be returned to him. And they will humbly advise His Majesty accordingly.

J. V. W.

Appeal allowed.

Solicitors for the appellant : *Wontner & Sons.*

Solicitors for the respondent : *Bramall & White.*

CRIMINAL REVISION.

Before Mookerjee, Acting C. J., and Fletcher J.

SATISH CHANDRA MITRA

v.

MANMATHA NATH MITRA.*

1920
 Aug. 20.

Summary Trial—Recording of evidence in non-appealable cases—Destruction by Magistrate of his notes of the evidence—Criminal Procedure Code (Act V of 1898) ss. 263 and 355.

Sections 263 and 355 of the Criminal Procedure Code must be read together. If the Magistrate is unable, at the commencement of the trial, to determine whether the proper sentence to be passed should be an appealable one or not, he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. But if he can, at this stage, determine that the sentence will be, in any event, non-appealable, he need not record the evidence. If, however, he actually does so, the notes of the evidence form part of the record of the case and cannot be destroyed by him.

Where the Magistrate had destroyed such record, the High Court was unable to form an opinion on the propriety of the conviction, and set it aside.

Jagdish Prasad Lal v. Emperor (1) approved.

* Criminal Revision No. 702 of 1920, against the order of Hari Charan Bose, Deputy Magistrate of Suri, dated May 28, 1920.

The complainant, Manmatha Nath Mitra, lodged a complaint, under s. 504 of the Penal Code, against the petitioner, before the Sub-divisional Officer of Suri, who issued a summons and transferred the case to Babu Hari Charan Bose, a local Deputy Magistrate. During the course of the trial the latter took down notes of the evidence of the witnesses on pieces of paper, but destroyed the same after embodying the substance of the evidence in his judgment. He convicted the petitioner under the above-mentioned section, on 28th July 1920, and sentenced him to a fine of Rs. 50.

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Babu Manmatha Nath Mukerjee (with him *Babu Bankim Chunder Mukerjee*), for the petitioner. The Magistrate may not have been bound to record the evidence in this case, but having done so, his notes were part of the record, and could not be destroyed by him : *Jagdish Prasad Lal v. Emperor* (1).

Babu Jyotindra Nath Das Gupta, for the Crown. The Magistrate was not bound to record any evidence. His private notes taken for his own use are not part of the record.

Babu Atulya Charan Bose (with him *Babu Sarada Charan Maity*), for the opposite party, argued on the same lines.

MOOKERJEE, A. C. J. This is a Rule calling upon the District Magistrate of Birbhum to show cause why the conviction of and the sentence on the petitioner, under section 304 of the Indian Penal Code, should not be set aside. The petitioner has been sentenced by a Magistrate of the first class to pay a fine of Rs. 50.

It has been brought to our notice that the Magistrate recorded the evidence but that record has been destroyed. In justification of the course thus adopted

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by the Magistrate, reference has been made to section 263 of the Criminal Procedure Code, which lays down that, in cases where no appeal lies, the Magistrate or Bench Magistrates need not record the evidence of the witnesses or frame a formal charge. This provision must be read with section 355 which provides that in summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. Consequently, the 'primary rule is that embodied in section 355, namely, that the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds; section 263 lays down by way of exception that in cases where no appeal lies, the Magistrate need not record the evidence. It may be difficult for a Magistrate to determine at the initial stage whether he will or will not pass an appealable sentence. In such a case the course he has to adopt is to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. If, on the other hand, even at the initial stage, he can make up his mind that in any event the sentence to be passed by him will not be appealable, he need not record the evidence. But if he does as a matter of fact record the evidence, that is, if he does not exercise the option vested in him under section 263, the record of the evidence becomes part of the record of the case; and we cannot trace any provision in the Criminal Procedure Code which authorises a Magistrate to destroy

any part of that record: *Jagdish Prasad Lal v. Emperor* (1). In the case before us, the evidence was recorded and was subsequently destroyed. The result is that we are not in a position to form an opinion on the propriety of the conviction, as we would have been able to do if we had the complete record before us.

The result is that this Rule is made absolute and the conviction and sentence set aside. The fine, if paid, will be refunded.

FLETCHER J. I agree.

Rule absolute.

E. H. M.

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APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee, Acting C. J., and Chaudhuri J.

BIRENDRA KUMAR BISWAS

v.

HEMLATA BISWAS.*

*Divorce—Nullity of marriage—Impotency—Syphilis—Fraud—Indian
Divorce Act (IV of 1869) ss. 18, 19.*

On a husband's petition for a declaration of nullity of marriage on the grounds of (i) impotency of the respondent at the time of the marriage due to syphilis, and (ii) the petitioner's consent to the marriage being obtained by fraud:

Held, that permanent and incurable impotency, existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible, was a good ground for annulment of marriage.

* Appeal from Original Civil No. 41 of 1919.

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