APPELLATE CRIMINAL.

Before Rankin C. J. and C. C. Ghose J.

JATI MALI

v.

KING EMPEROR.*

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Evidence—Admission—Indian Evidence Act (I of 1872), s. 33—Indian Penal Code (Act XLV of 1860), ss. 366, 376.

The application of section 33 of the Indian Evidence Act, in admitting a piece of evidence, depends entirely on the facts of each case and the discretion of the judge. This discretion should never be fettered.

CRIMINAL APPEAL, by the accused.

The facts of the case are as follows: The accused, Jati Mali and Bipin Patra with several others, abducted one Uttami Dasi on the night of the 25th April, 1928, and, thereafter, committed rape on her. On the night of occurrence, Uttami's son, Haripada, went out to ease himself and saw Jati Mali, Bipin Patra, Behari Das, Makhan Das. and others standing in front of their *sadar* gate. He ran back and told his mother about this. There were, at that time, two lights burning in the western *veranda* of the house. Jati Mali and Bipin Patra came to the *veranda* and caught hold of Uttami and carried her away. Haripada then went to Madhu Pal's house for calling Priya Bera. On going there, Haripada found that Priya Bera was sprinkling water on Dhira Dasi's face. Dhira Dasi was Uttami's sister and had escaped from the house. There, Dhira Dasi said that Jati Mali and Bipin Patra had carried away Uttami.

One Sripati Maiti was staying with Priya Bera at Madhu Pal's house on the night of occurrence. His deposition in the lower court had been accepted by the Sessions Judge of the 24-Parganas, Alipore, in

*Criminal Appeal, No. 886 of 1928, against the order of N. Lahiri, Additional Sessions Judge of 24-Parganas, dated Oct. 8, 1928.

evidence under section 33 of the Indian Evidence Act, as the investigating officer tried to secure Sripati's attendance during the Sessions trial, but his whereabouts could not be ascertained. The learned Sessions Judge, with the help of a jury, found the two accused, Jati Mali and Bipin Patra, guilty of offences under sections 376 and 366, Indian Penal Code, and sentenced each of them to suffer rigorous imprisonment for five years under section 376 and three years under section 366 of the Indian Penal Code, the sentences to run concurrently. Against this conviction and sentence both the accused preferred this appeal to the High Court.

Mr. Shashishekhar Basu and *Mr. Tarapada Banerji*, for the appellants.

The Deputy Legal Remembrancer, *Mr. Khondkar*, for the Crown.

GHOSE J. The appellants before us were charged before the learned Additional Sessions Judge of the Twenty-four Parganas and a jury under sections 366 and 376 of the Indian Penal Code. They were convicted on a unanimous verdict of the jury under the said sections and sentenced each to suffer rigorous imprisonment for five years under section 276 of the Indian Penal Code and for three years under section 366 of that Code, the sentences to run concurrently.

The short facts are as follows:—On the night of the 25th April, 1928, it appears that Uttami Dasi's husband was absent from home and so also was his brother. Taking advantage of that fact, 8 or 10 persons, including the present accused, are alleged to have entered the house of Uttami Dasi and forcibly carried her off. They also attempted to seize Uttami's sister, but the latter managed to run away. It is further alleged that these men took Uttami to the bank of the river near by, threatened her that she would be put to death, beat her and forcibly ravished her and then left her in the fields. Uttami was found by her son, Haripada, her sister, who is P. W. 3, and

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a neighbour, who is P. W. 4. She was taken home by these persons and nursed. She recovered after some time and related what had happened. She mentioned the names of the present accused. The *matbars* of the village, being informed about the occurrence, came to her house, but it appears, that these men were at first against any information being lodged with the police. Their reason was that some of their relatives and friends were involved in the case. Uttami Dasi, however, managed to send Haripada to the *thana* on the 27th April, 1928, and the latter lodged an information with the police. A police investigation followed and the accused, along with several others who were absconding, were sent up for trial.

The first point urged on behalf of the appellants is that the learned Sessions Judge ought not to have admitted in evidence in his court the deposition of a witness named Sripati Maiti under section 33 of the Indian Evidence Act. Now the matter stands thus: this witness, Sripati Maiti, had given evidence on behalf of the prosecution in the committing magistrate's court. In the Sessions Court, he was not available and the police officer in charge of the case stated on good authority before the learned Sessions Judge that enquiries had been made about the whereabouts of Sripati, but he could not be traced. Thereupon, the deposition of Sripati in the committing magistrate's court was admitted in evidence by the learned Sessions Judge. In my opinion, the learned Sessions Judge was entirely right in admitting in evidence the deposition of Sripati in the committing magistrate's court. Sufficient foundation for the admission in evidence of that deposition had been laid, in view of the evidence of the police officer, who is P. W. 9, and it appears to me that the learned Sessions Judge had reasons to be satisfied that the requirements of the statute had been complied with. It is impossible to lay down any hard and fast rule for the application of section 33 of the Indian Evidence Act. Each case must depend upon its own facts and the matter is essentially one for the exercise of discretion

on the part of the Sessions Judge. I am reluctant to say a single word which will have the effect of fettering the exercise of such discretion. It is sufficient for me to observe that no attempt was made on behalf of the defence to challenge in any way the statements made by the police officer in the course of his deposition in the Sessions Court relating to the whereabouts of Sripati and, if that was so, there was nothing wrong or illegal in what was done by the learned Sessions Judge. This point fails and must be negatived.

The second and the third points relate to the question as to whether the evidence of two witnesses named Haripada Das and Priya Bera had been fully placed before the jury or not. The learned Sessions Judge's charge to the jury has been read out to us in its entirety and I am not prepared to say that the charge is in any way defective so far as the evidence of these two witnesses is concerned. I think it is an entirely wrong view to hold that it was the duty of the learned Sessions Judge to incorporate in his charge the evidence of witnesses who had already given their depositions before the jury. The duty of the Sessions Judge is to place before the jury in a coherent manner the salient points arising on the evidence adduced before the jury and, in my opinion, it is no part of the duty of the Sessions Judge to make a second speech on behalf of the defence. In this case, I have examined the passages in the evidence of these two witnesses, to which attention has been drawn by the learned advocate for the appellants, and I am satisfied that no prejudice, whatsoever, has been caused to the appellants in any way by the manner in which the charge was framed by the learned Sessions Judge. There is no substance in these two points and they must also be negatived.

There is one small point which has been urged and it is this, that the Chemical Examiner's report should have been placed before the jury. Now, there is no evidence on the present record that any report from the Chemical Examiner was at all obtained by the

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police. It may be and probably is the fact that the Chemical Examiner was asked to examine a certain piece of cloth, but it does not appear that the Chemical Examiner ever sent in his report or that such report was available to the prosecution and that such report has been withheld by the prosecution.

I am of opinion that there is no substance whatsoever in this appeal and it must be dismissed. The appellants, if on bail, must surrender to their bail bonds and serve out the remainder of the sentences imposed on them.

RANKIN C. J. I agree.

O. U. A. *Appeal dismissed.*

CRIMINAL REVISION.

Before Suhrawardy and Graham JJ.

RAJANIKANTA RAY

v.

IBRAHIM SARKAR.*

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Irregularity—Omission to put question as to the public right to the way or river obstructed, if curable by section 537, Cr. P. C.—Section 139 A of the Code of Criminal Procedure, scope of—Code of Criminal Procedure (Act V of 1898), ss. 139A, 537.

Where a party files a written statement and admits thereby that the river, which he is said to have obstructed, is a public river, but he claims that he has not put an obstruction in it but has built upon his own land,

held, section 139A of the Code of Criminal Procedure does not apply.

Even if section 139A applies to such a case, the omission to put a formal question to him under that section does not vitiate the entire proceedings but is curable by section 537 of the Code of Criminal Procedure.

CRIMINAL RULE, obtained by Rajanikanta Ray *alias* Pal, 2nd party.

On the complaint of Ibrahim Sarkar, 1st party, a conditional order, under section 133 of the Code of Criminal Procedure, was issued on the petitioner and others on the 8th March, 1928, by the Subdivisional Officer of Comilla, for the removal of certain obstructions caused to the public in the use of a river known as Marghara river, by filling up a certain portion of the river, raising its

*Criminal Revision, No. 1202 of 1928, against the order of N. L. Hindley, District Judge of Tippera, dated Nov. 5, 1928.