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for the purchaser to know in order to judge of the nature and value of the property. In this case the proclamation stated the fact of an incumbrance, but omitted to specify the amount of the mortgage debt still outstanding. This would leave the incumbrancer in a more favorable position than any one else to judge of the value of the equity of redemption, and as he was the purchaser, it is probable enough that this irregularity did occasion substantial injury to the judgment-debtor.

The order of the lower Court must accordingly be set aside, and the case remanded to the Deputy Commissioner to rehear the application with reference to the observations made above.

Costs will abide the result.

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

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March 25.

IN THE MATTER OF THE PETITION OF ROCHIA MOHATO (APPELLANT).

THE EMPRESS *v.* ROCHIA MOHATO.*

Evidence Act (I of 1872), s. 32, cl. 1, and s. 33—"Questions in Issue"—Charges added at Sessions—Depositions before Magistrate—Witness dying or absconding—Charge to Jury—Omission to notice Evidence—Qualification of Juryman.

In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial.

Held, that the evidence was admissible either under s. 32, cl. 1, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court.

* Criminal Appeal, No. 162 of 1881, against the order of H. Beveridge, Esq., Officiating Sessions Judge of Patna, dated the 19th February 1881.

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The question whether the proviso to s. 33 of the Evidence Act is applicable,—that is, whether the questions at issue are substantially the same,—depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

At the trial it was proved that the other witness who had been examined before the Magistrate had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read.

Held, that it was properly admitted under s. 33.

In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. This evidence appeared to the High Court to be *untrustworthy*.

Held, that the summing up was not defective on account of this omission on the part of the Judge.

The fact that a person is a clerk in the office of the Magistrate of the District, is not sufficient to disqualify him from sitting on a jury.

THE facts of this case sufficiently appear from the judgment.

Mr. *Gasper* for the appellant.

Mr. *M. Ghose* for the prosecution.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

PONTIFEX, J.—This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some error of law or misdirection by the Judge. Now it is alleged that we ought to interfere on two grounds: *first*, that evidence has been wrongly placed before the jury; and *secondly*, that in certain particulars there has been a misdirection, or rather a want of direction by the Judge.

With respect to the first ground that improper evidence has been placed before the jury, the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution and used in the Sessions Court under the following circumstances:

One of these witnesses was the person whom the defendant and his party were accused of assaulting, and who has since died. Now, before the Magistrate the only complaint was a charge of grievous hurt. But in consequence of the death of the person

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who was hurt, *viz.*, Khedroo, other charges were added before the Sessions Judge,—*viz.*, a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, under s. 33 of the Evidence Act, the questions in issue before the Sessions Court, and before the Magistrate, were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt; and therefore the issue that was before the Magistrate was the only issue that has been decided against the accused by the jury. It appears to us, that, by "the questions in issue," referred to in s. 33, being required to be "substantially the same," it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible under s. 33, and even if it were not admissible under s. 33, that it would be admissible under the first clause of s. 32 of the Evidence Act. The question whether the proviso to s. 33 is applicable,—that is, whether the questions at issue are substantially the same,—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted under s. 33.

With respect to the other deposition which was put in and read before the Sessions Court, it appears that a person named Jan Ali, alleged to be the gomasta of the ticcadar, was examined before the Magistrate, and that he lived in the cutcherry-house. A summons was properly taken out to be served on Jan Ali at the cutcherry-house; but the peon in his return stated that as he was unable to find Jan Ali and serve him

personally, he hung up the summons on the cutcherry-house. There is also evidence to show that Jan Ali suddenly disappeared from the cutcherry-house. It is further shown that inquiry was made in his native village whether he had returned there; but the result of the inquiry was that nothing had been heard of him. It was therefore impossible to say where Jan Ali was or to serve him with a summons. We think, under these circumstances, that his deposition was properly usable under s. 33 before the Sessions Court; and it does not appear that any objection was made before the Judge to its admission. We find on the record no petition or memorandum showing that objection was made when the deposition was read; but we do find that, on the part of the defendant himself, the deposition before the Magistrate of one of his own witnesses was put in and was used as evidence. We think, therefore, that both these depositions were properly admitted by the Judge to be used as evidence in this case.

We then come to the next ground before us, that there has been a misdirection by the Judge, or rather a want of sufficient direction to the jury. It is alleged that many matters were not mentioned by the Judge in his charge which ought to have been brought to the notice of the jury; and, in particular, stress was laid on the fact that the Judge made no reference whatever to the evidence of the witnesses for the defence. We asked that the evidence of the witnesses for the defence should be read to us, and it has been read to us, and we have no hesitation in saying that the Judge, by making no reference to it in his charge to the jury, acted favourably rather than otherwise towards the prisoner. For, if reference had been made to that evidence, it would at the same time have been necessary to point out to the jury that the witnesses were not in accord with one another; that their statements were discrepant; and that the evidence of the principal witness, who is now relied upon for the defence, was really unreliable.

Moreover, we know that the prisoner was defended by counsel in the Court below; and although particular points may not have been alluded to in the Judge's charge to the jury, we have little doubt that they were made, and properly made, much of

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by the defendant's counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

The Judge was not satisfied that the grounds were sufficient; nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

Under the circumstances, we must dismiss this appeal. The conviction and sentence will stand.

Appeal dismissed.

Before Mr. Justice Pontifex and Mr. Justice Field.

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March 23.

IN THE MATTER OF THE PETITION OF KALI KRISTO THAKUR (PETITIONER) *v.* GOLAM ALI CHOWDHRY (OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1872), s. 530—Record of Grounds—Police Report, Incorporation of—Evidence of Possession—Evidence of Title.

In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words, "whereas from the police report a breach of the peace probable," and found that certain persons were in possession.

Held that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded, *viz.*, in the first place, that the Magistrate is satisfied that a dis-

* Criminal Motion, No. 65 of 1881, against the order of Baboo Ackoy Chowdhry, Deputy Magistrate of Madaripore, dated the 14th January 1881.