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been shown in executing the decree. It is contended that s. 230 does not apply to this case.

It is true that if a decree has been transferred by assignment in writing to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Then s. 230 of Act X of 1877 would of course apply. But there is a proviso, the conditions of which must be fulfilled before the Court could allow the execution. The proviso attached to s. 232 is that notice in writing of the application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution. Until, therefore, this notice has been issued, and until the objections (if any) had been heard, the Court would not be in a position to grant execution. Up to the date of the present application, and though a former application had been made both under ss. 230 and 232, and in each case an order for serving the notice required by law had been made, the application for execution had not been granted. In the one case the decree-holder ceased to have any interest in the decree, and in the other, as we have seen, *talabana* had not been paid, and no execution was ordered. Therefore it would seem that the present application cannot be rejected on the grounds set forth in the Subordinate Judge's order, because no former application for execution had been granted, and, therefore, the question did not arise whether "on the last preceding application due diligence was used to procure complete satisfaction of decree."

We, therefore, decree the appeal with costs, and reverse the order of the Subordinate Judge and direct him to proceed to dispose of the application for execution.

Cause remanded.

APPELLATE CRIMINAL.

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June 6.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* KARIM BAKHSH.

Act X of 1872 *(Criminal Procedure Code), ss.* 149, 272—*Arrest pending appeal —Admissibility of the evidence of the respondent against another person concerned in the same offence—Accomplice—Act I of* 1872 *(Evidence Act), s.* 118.

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K and *B* were accused of being concerned in the same offence. *K* was first apprehended, and the Magistrate inquired into the charge against him, and committed him for trial, but the Court of Session acquitted *K*. The Local Government preferred an appeal against his acquittal, and the Magistrate arrested him with a view to his detention in custody until such appeal was determined. While *K* was so detained, the Magistrate inquired into the charge against *B*, who had meanwhile been arrested, and made *K* a witness for the prosecution, and committed *B* for trial. *K*'s evidence was taken on *B*'s trial.

Held per STUART, C. J. (SPANKIE, J. doubting), that *K*'s arrest was lawful, and that his evidence was admissible against *B*.

Held per SPANKIE, J., that, assuming that the Magistrate looked on *K* as an accused person and his arrest was lawful, the Magistrate should not have examined him as a witness against *B*, and that, assuming that *K*'s arrest was unlawful and that when he made his statement he was a free man, his evidence, if admissible, was not evidence on which a Court should place much reliance.

THE facts of this case, so far as they are material for the purposes of this report, were as follow: On the 3rd July, 1878, one Kamal was tried for an offence punishable under s. 328 of the Indian Penal Code by Mr. H. D. Willock, Sessions Judge of Azamgarh, and was acquitted. The Local Government appealed to the High Court against his acquittal. Before the appeal was admitted, Kamal was arrested by the order of the Magistrate of the District. While the appeal was pending and Kamal was in custody, he was made by the Magistrate a witness for the prosecution in the case of one Karim Bakhsh, who was charged with being concerned in the same offence as that for which Kamal was tried and acquitted by the Sessions Judge. While the appeal was still pending, Karim Bakhsh was committed to the Sessions Judge for trial on charges under ss. 328 and 392 of the Indian Penal Code, and on the 24th October, 1878, was tried and acquitted. The Sessions Judge observed with reference to the evidence of Kamal which was taken at the trial as follows: "His evidence is worthless: it affords no proof of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth."

The Local Government appealed to the High Court against the acquittal of Karim Bakhsh, contending, among other things, that the evidence of Kamal should not have been rejected by the Sessions Judge.

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The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The respondent did not appear.

The following judgments were delivered by the Court:

STUART, C. J.—Karim Bakhsh, the accused, respondent, in the present case, was one of three men, Kamal and Ilahi Bakhsh being the other two, who were believed to be accomplices in the drugging of a man named Akbar Shah with whom they fell in on their travels between Ghazipur and a place called Birni, and whom, when under the influence of the poisonous drug they had administered to him, they robbed of a large sum of money which, as the fruits of some business of his master, he was carrying home to the latter. Kamal was the first to be apprehended on the charge, and he after being duly committed by the Magistrate was tried before the Judge of Azamgarh and acquitted by that officer. But on appeal by the Government to this Court the acquittal was set aside and Kamal, the accused, was convicted and sentenced to rigorous imprisonment for three years. The evidence in the present case is substantially the same as that adduced against Kamal, the Judge taking the same view that he had done before, and also acquitting Karim Bakhsh, and the Government again appealing to us against that acquittal. I have again carefully considered all the evidence, and am clearly of opinion that the Judge has gone as far wrong in this case as he had done in the case of Kamal, and we must set aside his order. For, even irrespective of Kamal's deposition, I agree with Mr. Justice Spankie that the evidence given by the other witnesses, and in his view of which I entirely concur, is quite sufficient for the conviction of Karim Bakhsh. With respect to Kamal's evidence the Judge is of opinion that it is worthless, seeing that he considers that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." This allusion to Kamal's evidence was remarked on at the hearing, and we have to consider, first, whether the Magistrate was justified in re-arresting Kamal after his discharge by the Judge, and, second, whether, while so in custody again, his statement could be received in evidence against Karim Bakhsh. I am clearly of opinion that these two questions must both be an-

swered in the affirmative. Kamal's re-arrest was not only legal, but absolutely necessary in the interests of justice. The Government appealed, as it was by law entitled to do, against Kamal's acquittal; and the effect of that proceeding was to keep him still in peril, and it may even be said on his trial, and his re-arrest was simply a measure necessary for his safe custody pending and for the purposes of the appeal, and also to secure his personal presence and his punishment should he be, as he eventually was by the decision of this Court, convicted. Such a precaution was in the highest degree reasonable, and was in my opinion fully warranted by s. 92 of the Criminal Procedure Code, which provides that a police officer may, even without orders from a Magistrate and without a warrant, arrest "any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in a cognizable offence." For there can be no doubt that the effect of the appeal against Kamal's acquittal was to place, or replace, him in the position described in s. 92. And in this opinion I find I am supported by the ruling of a Division Bench of the Calcutta Court (Macpherson and Morris, JJ.), who in the case of *The Queen* v. *Gobind Tewari* (1) ordered the re-arrest of two acquitted persons under s. 92, directing them to be kept in custody till the hearing of the appeal. The reported argument addressed to the Court by the learned Legal Remembrancer, Mr. H. Bell, was extremely forcible, showing, as it did, that the power to re-arrest under such circumstances was by necessary implication vested in all Courts and officers with proper authority and jurisdiction, and that "where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it," quoting in support of this proposition an English case (2). Mr. Bell further successfully contended that "the admission of the appeal revived the charge against the accused, and it was absurd to treat persons accused of murder or of any other criminal offence as mere respondents in an appeal. Before the appeal was heard the accused ought to be in the custody of the law." And again "under s. 297 when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person, though there was no express provision on

(1) I. L. R., 1 Calc. 281. (2) *Bane* v. *Methuen*, 2 Bing. 63.

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the point in the section: and in the same way the Court had equal authority to redirect the re-arrest of the accused on the admission of an appeal." These views appear to me to be eminently sensible and just, and I strongly approve them, affording as they appear to do a sound rule to guide us in the present case. On this point of the validity of Kamal's re-arrest I may add that it appears to be warranted by the spirit and principle of s. 149 of the Criminal Procedure Code, which provides that "when a complaint is made before any Magistrate empowered to commit persons for trial before the Court of Session, that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session, such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaint," an appeal being virtually a re-trial on the same facts.

The next question is, whether the statement made by Kamal after his re-arrest and pending his appeal was admissible in evidence. I am clearly of opinion that it was, and that it ought to have been considered by the Judge, and to be considered by us now, along with the other evidence in the case. Such evidence would be admissible in an English Court—6 and 7 Vict., c. 85, s. 1, and 16 and 17 Vict., c. 30, s. 9—and I know of no law, regulation, or ruling in India excluding it. In one case the English law appears to have been followed by the Calcutta Court, *Queen* v. *Ashraf Shaikh* (1), and in the present instance there is the less reason for excluding such evidence, seeing that a precisely similar statement by Kamal was deliberately made by him in his own case, the facts of which were identical with the present case, which resulted in his conviction by this Court, and which statement very naturally influenced our decision.

I have only to add that I do not see that Kamal's statement can be said to have been given under duress, meaning, as that expression does, under illegal restraint or arrest: Kamal was simply by means of his arrest in safe custody for the purposes of the Government's appeal, and he was legally so. (The learned Chief Justice then proceeded to dispose of the appeal).

(1) 6 W. R. Cr., 91.

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SPANKIE, J.—We have already had this case before us on the appeal of the *Queen Empress* v. *Kamal* (1). The latter was tried separately for the same offence as that for which Karim Bakhsh was committed to the Sessions Court. The Sessions Judge acquitted Kamal. But the magisterial authorities obtained leave to appeal to this Court from the order of acquittal. When this Court tried the appeal, the order of the Sessions Judge was reversed and Kamal was convicted and sentenced to imprisonment for three years under ss. 107 and 238 of the Penal Code.

We accepted the evidence as good against Kamal which was adduced on the present trial of Karim Bakhsh, who has also been acquitted by the Sessions Judge.

There, however, is one feature in the case which presents some difficulty. After Kamal had been acquitted by the Sessions Judge, he was re-arrested by the Magistrate, and though under duress and awaiting the result of the appeal made on the part of the Crown against the order of acquittal, the Magistrate examined him as a witness against Karim Bakhsh. If the Magistrate regarded Kamal as still in the position of an accused person, though he had been acquitted, he should not have made him a witness against Karim Bakhsh. It may be that the apprehension of Kamal on the same charge after his acquittal by the Sessions Judge was unlawful. The appeal of the Crown had not been admitted when the arrest was made, at least this would appear to be the case. S. 118 of the Indian Evidence Act makes all persons competent to testify who are able to understand the questions put to them, and can give rational answers to those questions. But if the Magistrate looked upon Kamal as still in the position of an accused person under trial, he should not have made him a witness against Karim Bakhsh, against whom the inquiry preliminary to commitment for the same offence for which Kamal had been committed was proceeding. The position of Kamal was not that of an accused person admitted to give evidence under pardon, nor was it that of a person who had been separately tried and convicted of an offence, and who was afterwards made a witness against another person charged with the same offence. Nor was this a case where several persons were

(1) Unreported.

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jointly accused, and where any one of them was called as a witness either for or against his co-defendants. Assuming, however, that the re-apprehension of Kamal after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under s. 118 of the Act already referred to his evidence was admissible, but it is not evidence on which a Court would place much reliance, and the Sessions Judge, perhaps, has not overstated the case respecting it, when he remarks that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." There is however other evidence, which in Karim Bakhsh's case has already been accepted by this Court, and which in my opinion is sufficient to establish a very strong presumption of the guilt of the respondent which his defence failed to rebut. (The learned Judge then proceeded to consider this other evidence).

Appeal allowed.

1879
June 9.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANAHIA LAL AND ANOTHER (PLAINTIFFS) *v.* KALI DIN (DEFENDANT) *

Registration—Certificate of Sale—Mortgage.

Where the Subordinate Judge of Dehra Dún made and signed the following endorsement on a deed of mortgage of immoveable property:—"This deed was purchased on the 1st December, 1875, at a public sale in the Court of Dehra Dún, by *N* and *K*, plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of *N* and *K*, plaintiffs, against *R*, for self, and as guardian of the heir in possession of the estate left by *M*"—*held per* SPANKIE, J. that this instrument operated as a sale-certificate, and consequently, as it related to immoveable property of the value of Rs. 100 and upwards, it required to be registered.

Held per OLDFIELD, J.—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, it for the same reason required to be registered.

THIS was a suit for the possession of a plot of land appertaining to the premises of the Victoria Hotel at Dehra Dún. The facts

* Second Appeal, No. 1351 of 1878, from a decree of W. C. Turner, Esq., Judge of Saháranpur, dated the 16th September, 1878, affirming a decree of F. S. Bullock, Esq., Subordinate Judge of Dehra Dún, dated the 30th May, 1878.