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IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.

Criminal Procedure Code, that though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of "right," yet that the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. It is impossible for me to say, upon the affidavits before me, that the Rajah will not be a material witness to the defendant's case, and though it may be distasteful and unpleasant to him to appear as a witness in a Criminal Court, it is his duty, as one of Her Majesty's subjects, living under the protection of the law, to obey that law, and attend before the Judge in obedience to the summons. I have no doubt the Judge will make every arrangement to make such attendance as convenient and unobjectionable as is possible and consistent with the interests of the accused.

Application rejected.

APPELLATE CRIMINAL.

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September 21.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

QUEEN-EMPRESS *v.* ISHRI SINGH.

Criminal Procedure Code, s. 512— Act I of 1872 (Evidence Act), ss. 33, 157— Witness, threatening—Duty of Magistrate.

In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

Held that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

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Held, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code.

Per STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

In cross-examination before the Court of Session, a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody."

Held that if the Magistrate did so address the witness, he exceeded his duty.

THIS was an appeal from an order of Mr. J. C. Leupolt, Sessions Judge of the Bijnor-Budaun Division, dated the 18th August, 1886, convicting the appellant of murder and sentencing him to death.

The facts of the case appeared to be as follows:—

On the 19th March, 1874, one Fakir Chand was murdered at Gohta, in the Budaun district, and six persons, named Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh, were accused of the offence. Of these, all except Ishri Singh, who had absconded, were arrested and, after an inquiry by the Magistrate of the District, were committed for trial by the Court of Session by which they were convicted. Among the witnesses examined both before the committing Magistrate and the Court of Session were Musammat Durga, Musammat Chittan, Shera, Imami, and Kanhai Lal, and before the committing Magistrate Dr. Ruttledge, Civil Surgeon. The deposition of the last named was dated the 2nd April, 1874, and he deposed to having examined the dead body of Fakir Chand and to the injuries which he found thereon. The deposition of Musammat Durga before the Court of Session was dated the 29th April, 1874. The depositions of Musammat Chittan, Shera, Imami, and Kanhai Lal before the committing Magistrate, who examined each of them on three different occasions, were dated in March, 1874, and before the Court of Session the 29th April, 1874. Musammat Durga and Musammat Chittan deposed to Ishri Singh having taken part in the murder with Pahlad Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh. Shera deposed to seeing Pahlad Singh, Moti Singh, Umrao Singh, Mansukh, and a man

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whose name he did not know, but whom he could identify, striking Fakir Chand. Imami deposed to have seen two men, whose faces were covered with cloth, running away in an easterly direction from the place where Fakir Chand had fallen down, and a little way behind them Umrao Singh also running in the same direction, and to have also seen Moti Singh, Fauji, and Mansukh running from the same place in a westerly direction. Kanhai Lal, son of Fakir Chand, deposed to have arrived on the spot while his father was still alive, but insensible, and to have heard at that time from Chittan and Shera that Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh were the murderers.

In May, 1886, the appellant was produced before the Magistrate of the District, and was subsequently committed for trial by the Court of Session for the murder of Fakir Chand. He denied that he was the Ishri Singh who had been accused of being concerned in that offence.

The Sessions Judge, referring to s. 33 of the Evidence Act (I of 1872), admitted in evidence against the appellant the depositions mentioned above of Chittan, Shera, Imami, and Kanhai Lal, who were all dead. He also admitted in evidence, with reference to the same section, the deposition of Dr. Ruttledge mentioned above. He also admitted in evidence the deposition of Musammat Durga before the Court of Session in April, 1874, apparently in order to corroborate her testimony against the appellant in this case. He convicted the appellant and sentenced him to death.

The appellant was not represented.

The *Offg. Public Prosecutor* (Mr. *A. Strachey*), for the Crown.

EDGE, C. J.—In this case I am of opinion that on the evidence of Musammat Durga and that contained in the deposition of Musammat Chittan taken before the Magistrate, there can be no doubt that one Ishri Singh took part in the murder of Fakir Chand, deceased. I have also no doubt on the evidence that the Ishri Singh who took part in the murder of Fakir Chand is the prisoner who has now been convicted.

Besides Musammat Durga, Lal Singh, who says he knew him for 20 years, Sita Ram, *Ahir*, who knew him for 12 or 13

years, Ganga *Brahman*, who says he taught him fencing—all speak to his identity. This is enough to say in reference to the appeal of the prisoner, which is dismissed and the conviction affirmed. As regards the sentence, considering the time that has elapsed, I think the ends of justice will be sufficiently met by reducing the sentence to one of transportation for life.

I have a few words to add regarding the proceedings and the evidence admitted in the case. It is said by Musammat Durga that the Magistrate, addressing her, said :—"Recollect, or else I will send you into custody." Her statement in this respect may be true or false. If the Magistrate did speak to the Musammat in this manner, he exceeded his duty. It is the duty of a Magistrate to protect a witness from coercion of that kind.

With regard to the depositions of the witnesses who were examined before the Magistrate in 1874, and who were proved to have died, I am clearly of opinion that these depositions were not admissible under s. 33 of the Evidence Act. In order to be admissible under that section, the proceedings in which the same evidence was given must have been between the parties or their representatives in interest, and the person against whom such depositions could be heard must have had an opportunity of cross-examining the witnesses.

Now the accused was not present when the evidence was given, nor was he a party to that proceeding. Does s. 512 of the Criminal Procedure Code make it admissible? The evidence of Musammat Chittan did come within the terms of the section, because we find it recorded by the Magistrate that the accused Ishri Singh was an absconder, and the Magistrate did record the depositions of the witnesses, and he was a Magistrate who was competent to try or commit for trial such absconder, if he had been present, for the offence complained of; and consequently, in my opinion, the deposition of Musammat Chittan before the Magistrate came within the terms of s. 512, and was admissible against the accused. As to the evidence given at the time before the Judge, that evidence was not taken as evidence against the absconder. It was recorded against the persons then being tried. Excluding, therefore, this inadmissible evidence, there is, as I have already point-

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ed out, ample evidence that the prisoner was one of those who took part in the murder of Fakir Chand in 1874.

STRAIGHT, J.—I am anxious to state the facts in this case which lead me to the same conclusion as the learned Chief Justice.

On the 19th March, 1874, one Fakir Chand was undoubtedly murdered by some persons, and shortly after the murder, the parties who were named as the perpetrators were six individuals, namely—(1) Pahlad Singh, (2) Ishri Singh, (3) Moti Singh, (4) Umrao Singh, (5) Fauji Singh, (6) Mansukh *Chamar*. Five of these persons, namely, Nos. (1), (3), (4), (5), and (6), were at once arrested, and taken before the Magistrate who held the inquiry, and on the 2nd April, 1874, these were all committed for trial to the Sessions Court. Nos. (1), (3), (4), and (6), were subsequently convicted and hanged, while Fauji escaped with a sentence of transportation for life. At the time of the inquiry before the Magistrate, the person named as Ishri Singh absconded, as was then proved, and through the proceedings in that officer's Court, he was distinctly mentioned as one of the participators in the crime charged against the others, and the statements of the witnesses to that effect were, as the depositions show, fully recorded. I therefore do not think it will be placing a strained interpretation on the language of s. 512 of the present Criminal Procedure Code, read in conjunction with s. 327 of the old Act, to hold that, *qua* Ishri Singh, those depositions were recorded for the purposes and within the meaning of that provision of the law, and were admissible at the trial out of which the appeal before us arises. I quite agree with the learned Chief Justice, however, in the limitation he would impose, by which he would exclude the evidence given in the sessions trial of 1874, as under the circumstances being inadmissible in the present case, though I am by no means prepared to say that such a limitation would invariably apply. It is clear that the Judge, from whose decision the appeal before us is preferred, was in error in receiving the depositions taken in the former proceedings under s. 33 of the Evidence Act as proof on the trial held by him, and he either did not carefully read the section in conjunction with the provisos, or, if he did, he failed to understand its meaning. The appellant was no party to the former proceedings, and he had no

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opportunity of cross-examining the witnesses, which circumstances removed the case from the operation of s. 33. But, as I have said, s. 512 of the present Criminal Procedure Code, taken in conjunction with s. 327 of the old law, meets the difficulty, and at least made the deposition of Musammat Chittan evidence at the trial. I also think that, under the special circumstances, the deposition of Musammat Durga, taken in 1874, was admissible, in advertence to the terms of s. 157 of the Evidence Act. I agree with the Chief Justice that there was good evidence before the Judge to show, first, that Ishri Singh was one of the persons who took part in the violence that led to the death of Fakir Chand, and secondly, that the appellant is that Ishri Singh. I concur therefore in dismissing his appeal, as also in the mitigation of the sentence to one of transportation for life. I can only add that if the statement of the girl Durga in the Court below, in cross-examination, as to the action of the committing Magistrate, is correct, the conduct of that officer was not only most improper, but absolutely illegal, and a repetition of it will involve very serious consequences.

CRIMINAL REVISIONAL.

1886
September 25.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* YUSUF KHAN.

Act XV of 1883 (*N.-W. P. and Oudh Municipalities Act*), *ss.* 69, 71—*Municipal rules—Infringement of rules—Prosecutions—N.-W. P. Government Notification No.* 865, *dated the* 3*rd November*, 1869—*Rule VI, legality of.*

Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner