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has failed to make out her first point. Her second point is that some witnesses on her behalf were not summoned. The answer to that is that she did not pay the *talbana* along with her application, or at all. The appeal is dismissed with costs.

Appeal dismissed.

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May 6.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS v. MULUA AND OTHERS.

Criminal Procedure Code ss. 232, 234, 537, 338, 339—*Separate offences, effect of trial of in the same proceeding—Evidence, admissibility of—Pardon, withdrawal of—Trial of person whose pardon has been withdrawn.*

In a Criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held. *Reg.* v. *Briggs* (1) referred to.

An accused person to whom a tender of pardon has been made, and who has given evidence under that pardon against persons who were co-accused with him, should not, if such pardon is withdrawn, be put back into the dock and tried as if he had never received a tender of pardon, but his trial should be separate from and subsequent to that of the persons co-accused with him.

Where four accused were at one and the same trial tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours previously and at a place close to the scene of the robbery and murder:—*Held* that the trial of these separate offences together, though an error or irregularity within the meaning of s. 537 of the Code of Criminal Procedure, would not necessarily render the whole trial void.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. C. Dillon*, for the appellants.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

EDGE, C. J. and BLAIR, J.—Mulua, Kamraj, Binda, and Suraj Pal have been convicted under s. 302 of the Indian Penal Code and and have been respectively sentenced to death. They have also been convicted of two charges under s. 392 of that Code and have

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been formally sentenced respectively to seven years' rigorous imprisonment on each charge.

Mr. *Dillon* has appeared for the appellants, and, in addition to contending that they ought not to have been convicted on the evidence, he has raised some objections as to the validity of the proceedings and convictions in the Sessions Court.

The murder was committed, roughly speaking, at about a quarter past 8 o'clock on the night of the 19th of November 1891, on a road leading from Batêsar fair. A party consisting of women and their attendants were attacked by four men with the object of robbery. Whilst the robbery was being carried out, a chaukidar, attracted by the noise, ran up shouting—"Take care, I am coming." Upon that, according to the evidence for the prosecution, the four men who were engaged in the robbery ran at the chaukidar and each of them hit him with a *lâthi*. The chaukidar died from fractures of the skull which caused effusion of blood upon the brain. There can be no doubt that his death was caused by *lâthi* blows inflicted by the men, or some of them, who were engaged in the robbery of Musammat Bijan's party. Of that robbery and that murder these four appellants have been convicted. Now there was a robbery committed between 5 and 6 o'clock that evening on the same road at a place from 3 to 3½ miles distant from the scene of the murder. These four appellants were at the same trial charged with, tried for, convicted of, and sentenced for the robbery committed between 5 and 6 o'clock.

The first point taken by Mr. *Dillon* was that it was illegal for the Sessions Judge to try the case of the first robbery along with the case of the subsequent robbery and murder. In our opinion there can be no doubt that the robbery which took place first, was, within the meaning of s. 233 of the Code of Criminal Procedure, 1882, a distinct offence from the offence of murder which was committed in the perpetration of the second robbery. The first robbery and the murder were not offences of the same kind within the meaning of s. 234 of the Code, and in our opinion, in cases of so serious a nature as that of murder, offences not immediately

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connected with the murder ought not, for the purposes of charge and trial, to be dealt with together. Now the question is whether the procedure involved more than an irregularity within the meaning of s. 537 of the Code. We are of opinion that the trial of the first robbery and the subsequent murder together was an error or irregularity within the meaning of s. 537 of the Code, and was not illegal in the sense which would make the whole trial void. Still that error or irregularity would make it necessary for us to set aside the proceedings in the trial below and order a new trial unless we were satisfied that the error or irregularity had not occasioned a failure of justice. Giving a wide meaning to "failure of justice," and adopting for the purposes of this case only the contention that Mr. *Dillon* urges that a failure of justice would have been occasioned if his clients were prejudiced by the charge for the first robbery and the charge for the murder being tried at the same trial, it is necessary to see in what respect these persons could have been prejudiced. Mr. *Dillon* contends that they were prejudiced, arguing that the evidence as to the first robbery which was given in support of that charge was not admissible in support of the charge relating to the second robbery and the murder. If that contention is sustainable, no doubt these men have been prejudiced in their trial, but in our opinion that contention is based upon a misconception of the law of evidence. Of the four men who were tried and convicted, Mulua had confessed fully to the robberies and the murder. That confession he made before the Magistrate. He also pleaded guilty at the Sessions trial. The other three men in their statements before the committing Magistrate had alleged *alibis* and had named witnesses to be summoned on their behalf to prove those *alibis* at the Sessions trial; so that it was manifest that the main contention at the Sessions trial would, so far as the three men other than Mulua were concerned, be one of identity. It was consequently material and relevant to show that these men were on that Batêsar road on the night in question, and not beyond the Chambal or elsewhere as their indicated *alibis* would suggest. Now, it is quite clear that on the question of identity and also on the question of whether or not on that night within two or three hours before the murder, they were at

a place sufficiently near the scene of the murder as not to preclude the possibility that they took part in the murder, evidence was admissible to show that between 5-30 and 6 o'clock that evening these men were together on the Batêsar road and at the place where in fact the first robbery occurred. The only question can be as to whether evidence of what they were doing at that particular place was admissible or not. In our opinion it was clearly admissible. It went to show the opportunities which the persons who spoke to the accused having taken part in the first robbery had of identifying the persons who took part in that robbery with the men in the dock at the trial. Evidence of this kind would be clearly admissible in England. Many years ago Baron Alderson, who was one of the most careful Judges on the English Bench in his time, admitted for the purposes of indentification evidence to prove that the person whom he was trying for robbery had on the same night committed a different robbery on a different person in the neighbourhood. That was in the case of *Regina* v. *Briggs* (1). It has been established in England by a long course of decisions, of which the common sense and propriety cannot be doubted, that evidence otherwise admissible cannot be excluded at a trial merely on the ground that that evidence shows that the prisoner against whom it is given has committed some other offence with which he was not charged at the trial. To confine the evidence as to the presence of these men at the scene of the first robbery to mere evidence that they were there and to exclude the circumstances under which attention was drawn to them would be to emasculate the evidence and to leave the Judge or the Jury or the Assessors without an opportunity of forming a judgment as to whether the witnesses who spoke to such identity had good opportunities of observing the persons whom they were identifying. We are, consequently, of opinion that, even if these appellants had not at this trial been tried for the first robbery, the evidence which was produced to show that they had taken part in it would have been extremely relevant and admissible on the question of identity which had to be determined in the trial for murder. Holding this view of the law and the facts we are of opinion that the

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error or irregularity in trying these appellants for the first robbery and for the second robbery and murder in the same trial did not occasion a failure of justice and did not prejudice the appellants to any greater extent than an accused may be said to be prejudiced by evidence as to his identity being rendered more conclusive, which could not be said to be a failure of justice. That disposes of the first point taken by Mr. *Dillon*.

The second point was that there were two Assessors and that the record of the trial before us contains only a record of the opinions of one of those two Assessors. The learned Sessions Judge states distinctly in his judgment that the Assessors unanimously convicted on all three counts. We are quite certain that he would not have made that statement in his judgment unless he had obtained from them their opinions and unless they had expressed their opinions that the prisoners before them were guilty of all three charges. How it is that the record of the trial contains the record of the opinion of one Assessor only we are unable to say, and as the learned Sessions Judge is on leave there is no immediate opportunity of clearing up the subject. If he did not record the opinion of the second Assessor, he committed an error, an omission and an irregularity within the meaning of s. 537 of the Code of Criminal Procedure, but it has not occasioned, in our opinion, a failure of justice.

The third point is that Mulua was tendered a pardon under s. 338 of the Code of Criminal Procedure. He had at the Sessions trial already pleaded guilty to all the charges, and two witnesses had been examined when the Sessions Judge made a tender of the pardon under s. 338. The pardon tendered was a pardon in respect of all the three charges, namely, the two charges of robbery and the charge of murder. Mulua was put into the witness-box and examined as a witness on the faith of the pardon tendered to him, and he gave his evidence. At the conclusion of that evidence the Sessions Judge formed the opinion that Mulua's evidence as to the second robbery and the murder was untrue. He came to that conclusion without having heard any witnesses in the case, except the

first two witnesses called. Those witnesses proved nothing to show that Mulua's evidence at the trial was false evidence. The Sessions Judge had before him, no doubt, the confession made by Mulua before the Magistrate, and he had probably also looked at the depositions taken by the committing Magistrate, and he had further on the Magistrate's record the deposition of the Civil Surgeon. The Sessions Judge being of opinion that Mulua's evidence as to the second robbery and the murder was false evidence, revoked the tender of pardon and put Mulua back from the witness-box into the dock and proceeded with the trial as against him and the other three accused. Whether or not that proceeding was illegal, it is quite clear to our minds that it might most seriously prejudice the defence of a man who was taken out of the dock in the middle of a trial to give evidence upon a tender of pardon, to put him back into the dock after his evidence had been taken and to proceed to try him as if the tender had never been made. It would be most difficult for a man placed in such circumstances to deal with the evidence or to defend himself and put forward any points which might be in his favour with any effect. It is very doubtful to our minds whether Mulua having given true evidence with respect to the charge relating to the first robbery was not entitled to the benefit of the pardon with respect to that charge. That charge as a criminal charge was quite distinct from the charges as to which the Sessions Judge considered Mulua's evidence to be false. In our opinion, where a man has given evidence upon a tender of pardon, and where that evidence has been false evidence or evidence in which he has wilfully concealed something essential, he ought not to be put back into the dock at once and tried, but the trial against him on the original charge ought to be a subsequent proceeding. Section 339 is not very clear in its wording, but it says that such person "may be tried for the offence in respect of which the pardon was so tendered, &c.," and that rather points, in our opinion, to the trial of such person not being merely a continuation of the trial at which he gave the false evidence, but a trial, so far as he is concerned, *de novo*. We have had great difficulty in making up our minds as to what would be the proper course to take with regard

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to Mulua, and we think that there being a doubt as to the legality of the procedure adopted with regard to him we should act on that doubt and set aside the convictions and sentences in his case and direct him to be retried in the Court of the Sessions Judge according to law. The Sessions Judge, should Mulua plead his tender of pardon as an answer to the charge relating to the first robbery, will have carefully to consider such plea. The convictions and sentences relating to Mulua are accordingly set aside, and he is directed to be retried. As to the other men, they are proved by evidence which leaves no doubt in our mind to have been present on the road that night on the occasion of the first robbery, and to have taken part in it, and to have been present at and to have taken part in the second robbery. We believe the evidence for the prosecution that Kamraj, Binda and Suraj Pal did strike the chaukidar with their *lâthis*, and that they were active participators in the murder. We say nothing as to whether Mulua took a part in that murder or not, as he will have to be retried; but it must not be assumed, from our refusing to express an opinion as to the witnesses against Mulua, that we doubt the correctness of their evidence. Those men who killed the chaukidar were engaged in the commission of a very serious offence, *viz.*, the offence of robbery. He was acting in the execution of his duty when he ran up, and they turned on him and brutally murdered him. In the opinion which we have formed, we have not used the confession of Mulua before the Magistrate or his evidence at the Sessions trial against any of these three men, indeed his evidence at the Sessions trial would not appear to have been admissible against them, because, as we infer from the record, the tender of the pardon was withdrawn and he was put into the dock as a prisoner before the other accused had had an opportunity of cross-examining him. We have, however, been asked by Mr. *Dillon* to consider Mulua's evidence relating to the murder so far as it is in favour of Binda and Kamraj. No doubt Mulua did put the whole murder, so to speak, upon the shoulders of Suraj Pal, but we prefer to follow the evidence of the other witnesses in the case which shows that Binda, Kamraj and Suraj Pal all took an active part in the murder. The evidence for the defence proves

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nothing so far as Binda, Kamraj and Suraj Pal are concerned.

We dismiss the appeals of Binda, Kamraj and Suraj Pal and we confirm in each case the conviction of murder and the sentence of death, and we direct that in each case the death sentence be carried out.

Appeals dismissed.

APPELLATE CIVIL.

1892
May 11.

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

JHINKA (DEFENDANT) *v.* LALDEO SAHAI (PLAINTIFF)*

Mortgage—Suit for sale by mortgagee against auction purchaser, mortgagee having accepted part of the proceeds of the former sale—Act VIII of 1859 *s.* 271—*Estoppel.*

On the 10th of February 1872, one S. R. mortgaged to the plaintiff an undefined one biswa share out of three biswas owned by him. On the 20th of March 1877, J. P. and G. P. brought to sale in execution of money decrees against S. R. two out of those three biswas, which two biswas were purchased by the defendant. The sale was confirmed on the 23rd of April 1877. Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part satisfaction of his mortgage. On the 16th of April 1877, the plaintiff sued the auction purchaser for sale of one biswa in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular biswa mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage.

THE facts of this case sufficiently appear from the Judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J. and BLAIR, J. This case is a simple one. The suit is for a declaration that a one biswa share purchased by the defendant, Musammat Jhinka, at an auction sale under a decree in 1877 is liable to be brought to sale and sold under a mortgage held by

* Second Appeal No. 185 of 1890, from a decree of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 30th October 1889, confirming a decree of Babu Madhub Chandar Banerji, Munsif of Bareilly, dated the 17th April 1889.