

1896

ANJHLI
v.
MANIK
HAND.

Procedure; and, further, upon the ground that it was not competent to the Magistrate to pass an order for the imprisonment of the complainant until some attempt had been made to recover the amount awarded as compensation. The Judge referred to *Queen-Empress v. Punna* (1) and *Ram Jeewan Koormi v. Doorga Charn Sadukhan* (2).

The reference was laid for disposal before a single Judge, who being inclined to dissent from the ruling in *Queen-Empress v. Punna* (1) referred the case to a Division Bench. The following order was passed.

EDGE, C. J., and AIKMAN, J.—We agree with the decision in *Queen-Empress v. Punna* (1) and, on the recommendation of the Sessions Judge, set aside the order awarding compensation and in default imprisonment.

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

1896.
August 26.

BRIJ BASI (APPLICANT) v. THE QUEEN-EMPRESS (OPPOSITE PARTY).
Act No. XLV of 1860 (Indian Penal Code), section 451—House trespass with intent to commit adultery—Evidence.

To sustain a conviction under section 451 of the Indian Penal Code for the offence of house trespass with intent to commit an offence, the prospective offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman the intent to commit adultery with whom is charged against the accused.

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

Mr. C. Dillon for the applicant.

The Government pleader, Munshi Ram Prasad, for the Crown.

EDGE, C. J. and AIKMAN, J.—Brij Basi was charged before a Magistrate with having committed the offence of lurking house trespass by night with intent to commit theft punishable under section 457 of the Indian Penal Code. The Magistrate, finding on the evidence that Brij Basi had no intent to commit theft altered the charge to one of house trespass in order to the committing of an offence punishable with imprisonment, specifying

* Criminal Revision No. 383 of 1896.

(1) I. L. R., 18 All., 96.

(2) I. L. R., 21 Cal., 979.

the offence as adultery with the wife of one Ram Gopal, and convicted Brij Basi under 451 of the Indian Penal Code. Brij Basi appealed. * The Sessions Judge, agreeing with the Magistrate, dismissed the appeal. Brij Basi has brought this application in revision. Ram Gopal was not the complainant. The complaint was preferred by a nephew of Ram Gopal, who was also living in the house. Ram Gopal was not called as a witness, and there was no evidence that Brij Basi had gone to the house to have connection with the wife of Ram Gopal without the connivance and without the consent of Ram Gopal. The offence of criminal adultery, *i.e.*, of adultery which is recognised by the Indian Penal Code as a criminal offence, is not committed unless connection with the married woman is without the connivance and without the consent of her husband. It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is a necessary part of the case for the prosecution to negative by evidence such consent or authority. In this case, if Brij Basi had actually been caught in the act of sexual intercourse with the wife of Ram Gopal, assuming that he knew her to be Ram Gopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the consent and without the connivance of Ram Gopal. Brij Basi was convicted of a house trespass in order to commit a criminal adultery with the wife of Ram Gopal. It was consequently necessary to support the prosecution to prove that if Brij Basi had had sexual intercourse on that occasion with the wife of Ram Gopal, it would have been without Ram Gopal's consent or connivance. The Court cannot make assumptions against prisoners in the absence of necessary evidence for the prosecution, and there was no evidence here to show that Brij Basi did commit the trespass in order to commit criminal adultery as that offence is

1896

 BRIJ BASI
 v.
 THE QUEEN-
 EMPRESS.

1896

BRIJ BASI
v.
THE QUEEN-
EMRESS.

defined by the statute. It was not even proved that Brij Basi had committed criminal trespass on this occasion. There would be no intent on his part to commit criminal adultery or to insult or annoy the owner of the house, Ram Gopal, unless Brij Basi was there to commit criminal adultery with the wife of Ram Gopal, i.e., to have sexual intercourse with her without the consent and without the connivance of Ram Gopal. There could be no intent to insult or annoy Ram Gopal if Ram Gopal was consenting or conniving at the adultery, and there is nothing in this case to show whether or not Ram Gopal was a consenting or conniving party. We allow this application, and we quash the conviction and the order of the Sessions Judge, and, acquitting Brij Basi of the offence of which he was convicted, order him to be at once released.

PRIVY COUNCIL.

P. C.
1896

June 17th,
18th and
24th, July
25th.

A. B. MILLER, OFFICIAL ASSIGNEE OF THE ESTATE OF RAMKISHEN DAS, (DEFENDANT-APPELLANT) AND BABU MADHO DAS (PLAINTIFF-RESPONDENT).

On appeal from the High Court at Allahabad.

Insolvency—Attempted preference—Evidence as to statement of a party to a suit, before proceedings—Act No. I of 1873, (Indian Evidence Act), sections 18 and 21.

AFTER an adjudication, under the Statute XI, Vic. Cap. 21, of insolvency against a trader in Calcutta, a creditor brought this suit against him, and the official assignee as co-defendant, the latter alone defending. The claim was for payment of a debt, and in default to obtain an order for the sale of land upon which the creditor averred that he held an equitable mortgage by deposit of title-deeds with him, before the adjudication, as security for the debt.—*Held*, that the burden was upon the plaintiff of proving the deposit by way of equitable mortgage to have preceded the adjudication.

The courts below having differed as to whether this prior possession had or had not been proved, an examination of the evidence led to the conclusion that the plaintiff had failed to prove that the title-deeds had been deposited before the date of the adjudication, as alleged by him.

On the question whether the courts below should, or should not, have received in evidence the testimony of a witness who had been informed by the

Present:—Lords WATSON, HOBHOUSE, and DAVEY, and SIR R. COUCH.