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neither roof nor wall but which was surrounded by houses and was approached by a narrow lane. In our opinion in the case which is now before us, the spot where the gambling is said to have taken place was a sufficiently defined area so marked out that it could be found and recognized as the place where the business of betting was being carried on. The argument has been raised that the adjective "walled" in Act III of 1867, applies not only to the noun 'enclosure' but also to the two nouns 'room or place.' With this we cannot agree. It is clear that the word "walled" is applied only to the word "enclosure." It could hardly in common parlance be used with the word "room." We therefore are of opinion that the decision of the Magistrate in so far as the meaning of the word "place" is concerned is incorrect, and we must therefore set aside the order of acquittal. At the same time the case is one of a very trivial nature. The accused have been subjected practically to two trials, one in the court below, and one in this Court, and we think that the ends of justice have been sufficiently met. We therefore do not direct that the accused be again placed upon their trial.

Order set aside.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir George Knox.

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Act No. X of 1873 (*Indian Oaths Act*), *sections* 5, 6 *and* 13—*Act No.* I *of* 1872 (*Indian Evidence Act*), *section* 118—*Evidence—Statement of witness not recorded on oath—Capacity of child of tender years to testify.*

The fact that a court has advisedly refrained from administering an oath to a witness is not sufficient by itself to render the statement of such witness inadmissible. But a court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the court thereof, and if the court is so satisfied it is best that the court should comply with the provisions of section 6 of the Indian Oaths Act, 1873, in the case of a child just as in the case of any other witness. *Queen-Empress* v. *Maru* (1) dissented from.

THIS was an appeal from jail against a conviction under section 302 of the Indian Penal Code and a sentence of death. The Sessions Judge had based his judgement to some extent on

*Criminal Appeal No. 668 of 1915, from an order of D. R. Lyle, Sessions Judge of Agra, dated the 9th of August, 1915.

(1) (1888) I. L. R., 10 All., 207.

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the statement of a small boy of some six years of age, to whom, however, in view of his tender years, he had intentionally omitted to administer an oath. In respect of such omission the evidence of this witness was challenged as being inadmissible in evidence regard being had to the provisions of the Indian Oaths Act, 1873.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

RICHARDS, C. J., and KNOX, J. :—Dhani Ram and Chote Lal have been found guilty of the murder of Durga Prasad and sentenced to death. They have appealed. The second accused is the son of the first accused. The deceased was the only son of Sobha Ram, a brother of the first accused. The first accused had another son called Salig who died childless leaving a widow Musammat Deo Kunwar. On the 16th of August, 1911, Durga Prasad made a will in favour of the second accused leaving him all his property. Beyond all question Durga Prasad was most brutally murdered. Dhani Ram in the court below admitted the murder and he admits it in his petition of appeal. Chote, however, denies his guilt. The case for the prosecution is that the motive for the murder was to anticipate the succession to Durga Prasad's property and to prevent him incurring more debts, mortgaging or dealing with his property or cancelling the will.

[Their Lordships then proceeded to discuss the evidence against Dhani Ram.]

We proceed to consider the case as against the second accused. It is improbable that the father would have committed the murder alone. If we are correct in the view we take of the motive, Chote had a greater motive than the father.

A little boy of the name of Ram Rup, aged about six years, was examined in the court below. His statement is beyond question of the utmost importance. It directly implicates and if believed, brings home his guilt to the second accused. There is evidence that the boy made the same statement immediately after the murder. One of the grounds of appeal was based on the decision in the *Queen-Empress* v. *Maru* (1). The objection was that, the learned Judge having "advisedly" refrained from administering the oath to the little boy, his statement is inadmissible. We are not prepared to accept altogether the ruling in the case of

(1) (1888) I. L. R., 10 All, 207.

Queen Empress v. *Maru*. No doubt section 6 of the Indian Oaths Act of 1873 provides that (save as in the section provided) every witness shall make an oath. Section 13 of the Act, however, provides that no omission to take any oath shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. We are unable to hold that the mere fact that the court *advisedly* refrained from administering the oath renders the statement of the witness inadmissible. In our opinion a court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the court thereof. If the court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the court thinks that the child, though of tender years, is capable of informing the court of what it has seen or heard, it is best that the court should comply with the provisions of section 6 in the case of a child just as in the case of any other witness. Whether or not a child should be examined must depend on the circumstances of the particular case, including of course the nature of the evidence he is about to give. It seems to us pretty clear from the record that the boy Ram Rup was intelligent. We thought it nevertheless advisable to examine the boy ourselves the charge being the grave one of murder. We accordingly had the boy produced before us in the presence of the accused, the oath was duly given and the witness examined.

[Their Lordships then proceeded to discuss the evidence of the boy.]

After careful consideration of the case we are quite satisfied that the unanimous opinion of the learned Sessions Judge and of the assessors is correct. We dismiss the appeal, confirm the convictions and sentences and direct that the latter be carried into execution according to law.

Appeal dismissed.