REVISIONAL CRIMINAL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.

EMPEROR *v.* MANTU TIWARI AND OTHERS.* 1926 October, 28.

Criminal Procedure Code, sections 263 and 264—Summary trial—Notes of evidence by Magistrate not necessarily part of the record.

In cases in which sections 263 and 264 of the Code of Criminal Procedure are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all, and whether he takes them or whether he does not whatever notes he makes are his private property which he can treat exactly as he pleases. *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (1), dissented from.

THIS was a reference to a Division Bench made by BOYS, J., in the following circumstances:—This reference by the learned Sessions Judge of Benares deals with a point of procedure which leads to constant discussion, and though in the particular case before me I have no doubt as to what the decision should be, it is desirable that the matter should be considered by two Judges, as the ruling of this Court will govern the conduct of every summary trial throughout the province for the future.

The question is whether, if in a summary trial a Magistrate takes notes of the evidence, he is obliged to make those notes part of the record. Before referring the case I will make a few observations as the result of my consideration of it, to save the time of the Bench before whom the case may come. The learned Sessions Judge has asked that "a definite ruling might be made by the Hon'ble High Court as to whether it is necessary briefly to record evidence in appealable cases and whether, if rough notes be made

* Criminal Reference No. 428 of 1926.
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of the evidence, it is necessary that such notes should be kept and form part of the record." I note first that the learned Judge refers to "appealable cases." The case before him was not one of appeal but an application for revision. The sentence was only Rs. 50, and though in addition to that there was an order for security, that order was passed under section 106 of the Code of Criminal Procedure and was not passed under section 118 and no appeal from that order would lie independently of the principal case. The question, therefore, as stated by the learned Judge does not actually arise. I understand, however, that what in substance he requires is a ruling of this Court as to whether a Magistrate in a *summary trial may* record notes or must record notes, and whether, if in fact he does record notes, those notes must be made part of the record. He refers to *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (1), and two cases reported in Indian Cases in which the same view was taken. It is hardly necessary to consider the two later cases. Their Lordships of the Calcutta High Court held that the record of the evidence which the Magistrate had destroyed should have been kept with and formed part of the record. They were of opinion that section 263 only says that a Magistrate need not record the evidence, but that if he chooses to do so, the provisions of sections 355 and 356 come into play and that the record of the evidence must be made part of the record of the case. That case is clearly distinguishable from the present. It is not suggested here that the Magistrate in the exercise of his discretion decided to "record the evidence." He did no more than take a few "notes." This decision, therefore, of the Calcutta High Court has no bearing on the present question, which is merely whether a

(1) (1920) I.L.R., 48 Calc., 280.

Magistrate deciding not to record the evidence, but making a few notes of that evidence, must keep those notes on the record. I have no doubt myself that he need not do so. It may be a question of some difficulty in a particular case whether a particular piece of paper on which are recorded facts stated by the witnesses amounts to a " record of evidence " or merely to notes, but there could rarely be serious difficulty. If a Magistrate means to " record evidence " he does so formally, more or less completely, and there can be no doubt about what the record was intended to be. On the other hand, if he jots down a few notes, possibly unintelligible to anybody but himself, merely for purposes of reference, there can be no doubt that such a document would not be a record of the evidence.

In regard to this latter type of notes it is, however, difficult to see how it could possibly be made part of the record, apart from the fact that such notes would be frequently unintelligible. The appellate court must decide the case on the record, and if it has to look at a record of evidence, that record of evidence must be one kept in accordance with the requirements of the Code of Criminal Procedure.

I further note that there is no reference throughout the whole of the Code of Criminal Procedure or the Evidence Act, so far as I am aware, to " notes " being taken of the evidence. It may be necessary to record evidence in full; it may be necessary to record a memorandum of the evidence, but there is no provision referring to " notes " as such.

It appears to me clear that when a Magistrate decides to try a case summarily he will first consider whether it is likely in the event of a conviction that an appealable sentence will be called for. If he decides that a non-appealable sentence will probably be sufficient, he will proceed under section 263. In that case

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be not only need not record the evidence or a memorandum of the evidence, but he need not make any notes at all of the evidence and he need not even say in his judgement what the evidence was, except in so far as he must briefly state the reasons for his opinion. If he decides that an appealable sentence is required or if, having decided that a non-appealable sentence will probably be sufficient, he subsequently has to change his mind, he must then embody in his judgement, in addition to the particulars required by section 263, "the substance of the evidence"; in other words, the only difference between sections 263 and 264 is that in appealable cases the judgement must contain "the substance of the evidence." In neither case need there be any record of the evidence or any memorandum of the evidence. I should, therefore, myself have no hesitation in holding that if a Magistrate for the purpose of assisting his own recollection jots down a few notes, those notes are nothing more than the notes taken by any Judge hearing an appeal for his own assistance, and need not and should not form part of the record. Section 264 is precise that the judgement shall be the only record. I should, therefore, have no hesitation myself in holding that any notes that do not amount to a record of the evidence in the sense in which that term is ordinarily understood (*cf.* sections 355 and 356) do not amount to a part of the record, need not be kept on the record and should not be kept on the record.

In view, however, of the universal application of the ruling that I would lay down to all summary trials throughout these provinces, I think it is desirable that the case should be laid with the above remarks before two Judges.

Munshi *Kumuda Prasad* and Munshi *Gadadhar Prasad*, for the applicants.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown.

WALSH, A. C. J., and BANERJI, J.:—In our opinion Mr. Justice Boys has taken the right view in this matter, and, so far as this High Court is concerned, we declare that the provisions of sections 263 and 264, in cases in which these sections are applicable, are not controlled by section 355, Code of Criminal Procedure. To attempt to apply them really introduces confusion and amounts to amending the Act. It seems to us that the matter is really quite clear, and has only been complicated by the decision in the case of *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (1), with which we are unable to agree. Summary trials are dealt with in two different categories. Cases under section 263 are unappealable. In such cases the Magistrate need not record the evidence, and he is only bound to enter the particulars mentioned in the section. In section 264 he has to do a little more, namely, record a judgement embodying the substance of the evidence. There is nothing in that section compelling him to record the evidence. Some people have the gift of remembering, repeating and embodying in a judgement evidence which they have heard, without the assistance of any note recording such evidence. Section 264 leaves a Magistrate, who thinks he is able to do that, perfectly free to do so if he likes, but if, on the other hand, like at any rate one member of this Bench, he finds it necessary to assist his recollection and his opinion by making, what you may call, notes or private memoranda or a temporary record of the evidence to aid him in coming to a satisfactory conclusion, such notes or memoranda

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form no part of the record of the case. They are only the vehicle which conveys to his mind the substance of the evidence which the section requires him to embody in the judgement. The section clearly enacts that the judgement embodying the substance of the evidence which the Magistrate has heard shall be the only record, and in our view we could not order or declare that the Magistrate was bound to make something else part of the record, not mentioned in the section, without adding to or amending the section. It appears to us, with all respect to the learned Judges who decided the matter in Calcutta, that in order to arrive at the decision at which they did, it was necessary to jump over a very wide gulf. It is true, as the judgement points out, that the primary rule is embodied in section 355, and that requires a Magistrate, in cases to which that section is applicable, to make a memorandum of the substance of the evidence in the case. That is a compulsory memorandum. Section 355, sub-section (2) makes such memorandum, or, in other words, the compulsory memorandum a necessary part of the record. The fact that such compulsory memorandum does not apply to summary trials under either section 263 or section 264 seems to be conclusively established by the language of section 354. With great respect, it seems to us that the judgement of the Calcutta High Court treated the voluntary memorandum, or notes, or pieces of paper, whatever you like to call it, which the Magistrate chose to use to assist himself, either in an unappealable case under section 263, or in an appealable case under section 264 in which he had to embody the substance of the evidence in the judgement, as on the same footing and subject to the same statutory requirements as a compulsory memorandum which he was bound to take under section 355. In our view the statute does not justify

us in taking that view, and we hold that in cases in which sections 263 and 264 are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all, and whether he takes them or whether he does not, whatever notes he makes are his private property which he can treat exactly as he pleases.

As a matter of reasonable practice and common sense, which ought to solve most questions without the trouble of referring to a statute at all, it seems to us that if it turned out that a case is appealable and an appeal is eventually brought, and the Magistrate happens to have taken private notes, and when he is asked if he will lend them or provide them to the court of appeal for the purpose of hearing the appeal, and they are still in existence, there is no reason at all why he should not do so. That is a practice which one member of this Bench has invariably followed in the exercise of original civil jurisdiction in this Court when an appeal has been brought from his judgement. A Magistrate may supply copies to the parties or send the original to the court of appeal. This is merely an act of convenience and courtesy. A hard and fast rule issued by the District Magistrate that every Magistrate should destroy the notes seems, on the face of it, unnecessarily to hamper the discretion of his subordinate officers. It is often of great convenience when you are asked about something which happened in a case three months ago—it may have nothing to do with an appeal, it may relate to the conduct of some professional gentleman who was engaged in the case—to be able to refer to your own private notes, which you happen to have preserved. You are thus able to refresh your recollection, just as a man of business is able to refresh his recollection as to what happened a long time ago from his books.

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or diary, but we have no jurisdiction to dictate to the District Magistrate what he should do in this or any other matter, which is solely vested in his discretion, or to make any declaration about any order relating to such notes which he may have issued. The most we can do is to suggest, as we have done, a practical way of dealing with the matter.

We, therefore, reject the reference and direct the record to be returned to the Sessions Judge with the foregoing observations.

Reference rejected and record returned.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

1926 October, 29.

RAM KHELAWAN AND OTHERS (DEFENDANTS) *v.* BANKE BIHARI AND ANOTHER (PLAINTIFFS) AND RAM KALI (DEFENDANT).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), section* 19*—Pre-emption—Effect of acquisition of an interest in the mahal by the defendant vendee pending the suit.*

Under the Agra Pre-emption Act, 1922, the right of a plaintiff pre-emptor may be defeated by the acquisition by the defendant vendee at any time before decree, by means of gift, of an interest in the mahal in which the property in suit is situated. *'Qudrat-un-nissa Bibi* v. *Abdul Rashid* (1), followed.

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

Munshi *Narain Prasad Ashthana*, for the appellants.

The respondents were not represented.

LINDSAY and SULAIMAN, JJ. :—This is a defendants' appeal arising out of a suit for pre-emption. While the suit was pending the defendants obtained a share under a document purporting to be a deed of

* Second Appeal No. 1093 of 1925, from a decree of Muhammad Said-ud-din, Second Additional Subordinate Judge of Allahabad, dated the 25th of March, 1925, reversing a decree of Brij Mohan Lal, Munsif of East Allahabad, dated the 18th of November, 1924.

(1) (1926) I.L.R., 48 All., 616.