

clusion that the objection urged for the respondents is fatal to the suit, and that the plaintiff has no legal *status* to maintain it. I do so with much regret, but plain principles of law seem to preclude me from arriving at any other result. I am therefore of opinion that, on the grounds I have stated, the decision of the Subordinate Judge must be sustained, and this appeal dismissed with costs.

OLDFIELD, J.—I concur with my colleague, Mr. Justice Straight, in holding that the suit cannot be maintained.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA v. YAKUB KHAN.

Confession—Code of Criminal Procedure (Act X of 1872), ss. 122, 193, 346—Code of Criminal Procedure (Act X of 1882), ss. 342, 364.

On a certain day a confession by an accused person was recorded by a Magistrate, and on the next day the same Magistrate, having jurisdiction to do so, examined the witnesses for the prosecution and eventually committed the accused. *Held*, following *Empress v. Anuntram Singh* (1), that such confession, having been made to a Magistrate competent to hold, and who actually then was holding, an inquiry preliminary to committal, must be regarded as falling within s. 193 of Act X of 1872, or s. 342 of Act X of 1882, and as such governed by the reservations contained in s. 346 of the former Act or s. 364 of the latter.

Observations on ss. 342 and 364 of Act X of 1882 (Criminal Procedure Code).

THIS was an appeal by the Local Government from a judgment of Mr. E. B. Thornhill, Sessions Judge of Aligarh, dated the 29th June, 1882, acquitting one Yakub Khan of rape. The evidence against the accused consisted of a confession made by him to the committing Magistrate, and of the statement of the girl, aged seven years, on whom the offence was committed, who was examined without being affirmed. The Sessions Judge refused to receive the accused's confession in evidence, and, being of opinion that the accused ought not to be convicted on the statement merely of the girl, acquitted him. The Sessions Judge's reasons for refusing to receive the confession in evidence were as follows:—

“The accused, on the 12th May, made a statement before the committing Magistrate, and the record shows that the accused was brought up by the police before the Magistrate on the 12th May, to have his statement recorded, and no witnesses were examined till the

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13th May, although the statement of the accused was recorded on the 12th May; so that the statement is shown to have been made before the preliminary inquiry commenced, and should have had the certificate required by s. 122 of the Code of Criminal Procedure (Act X. of 1872) that the Magistrate believed the confession or statement was voluntarily made. Had the statement or confession, for such it was, been made during the course of the preliminary inquiry, the certificate as to the Magistrate's belief that the confession or statement was voluntarily made would not have been required; and the provisions of s. 346, Criminal Procedure Code (Act X. of 1872), which had not been complied with, such as the statement not having been signed by the accused, nor having had his mark attached to it, and the statement not having been recorded in the form of question and answer, might have been rectified, and the evidence of the committing Magistrate with respect to the statement might have been taken to prove that the statement had been made by the accused. But it has been ruled that errors and omissions in procedure in recording statements made under s. 122 cannot afterwards be rectified by taking further evidence, that the statement was made before the Magistrate, so that the statement made by the accused before the Magistrate cannot now be rectified by evidence being taken that it was made. The statement could not therefore be placed on the record in this Court, or read to the assessors, or taken into consideration against the accused".

The *Junior Government Pleader (Babu Dwarka Nath Banarji)*, for the Crown.

The respondent did not appear.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following

JUDGMENT—We observe, with some surprise, that the petition of appeal was not presented until the 4th of October, or more than three months from the date of the order complained of; and we are constrained to express our regret that, with whomsoever the fault may be, there should have been so much delay in steps being taken to impeach the judgment. The circumstance is not of so much importance in the present instance, as there is evidence sufficient on the record to enable us, supposing we admit the legal objections to the

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accuracy of the Judge's decision, to deal with the matter upon the merits. But there are cases in which the contingency arises that we have to order a new trial, or further evidence to be taken, and the longer the interval that has elapsed since the first investigation and trial, the greater is the inconvenience and difficulty, not only to get witnesses together again, but to obtain from them accurate or reliable testimony. It is true that a period of six months is the limitation allowed by law for appeal from acquittals, but we would earnestly commend to the attention of Government the policy of, and necessity for, such appeals, when made, being preferred with all reasonable expedition possible, not only in the public interest but in justice to the persons whose acquittal it is sought to reverse. So far as this Court is concerned, the present case would have been disposed of some time since but for postponements granted at the request of the respondent's counsel, and at last, he having failed to appear on the date peremptorily fixed for the hearing, we felt ourselves compelled to proceed with and dispose of it in his absence.

No questions of a complicated nature are involved in this appeal, and it may easily be disposed of.

The decision of the Judge is impeached upon two grounds: *first*, that he should not have rejected the statement of the respondent before the committing Magistrate, as amounting to a confession under s. 122 of the Criminal Procedure Code of 1872; *secondly*, that without his statement there was sufficient evidence to warrant a conviction.

As to the first of these points, we think the contention is a sound one, and must prevail. On the 12th of May, when the respondent made the statement in question, he was before a Magistrate competent to hold, and who actually then was holding, the preliminary inquiry into the charge under s. 375 of the Penal Code, with a view to committing the accused for trial to the Sessions Court. S. 122, upon which the Judge relies, relates to statements or confessions made to a Magistrate other than the Magistrate investigating a case for committal; and adopting and approving the decision of a Full Bench of the Calcutta Court in *Empress v. Anuntram Singh* (1), we are clearly of opinion that the statement

(1) L. L. R., 5 Calc., 954.

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of the respondent, made on the 12th of May, must be regarded as falling within s. 193 of the old, or 342 of the present, Code, and, as such, governed by the reservations contained in s. 346 of the old, or 364 of the present, Criminal Procedure Code. Although the statement was not recorded by question and answer, as it should have been, we find a certificate signed by the Magistrate to the effect that such statement was taken in his presence and hearing, and contains accurately the whole of the statement made by the accused. We may here remark that Magistrates, as a rule, do not as strictly follow the provisions relating to the taking the examination of accused persons in this respect as they should. We think it well to point out, in reference to ss. 342 and 364 of the new Code, that, while it is not intended to empower them to cross-examine persons charged before them, they are nevertheless authorized to put any questions which appear necessary at any stage of an inquiry or trial, and particularly when all the witnesses for the prosecution have been examined, "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." Such questions, with the answers given, should be recorded in full, and when completed, should be read over to the accused, who is to be permitted to explain or add to his answers, and such explanation or additions must be taken down. After this has been done, the examination must be signed at the foot by the accused and by the Magistrate, who should further certify that it was read over to the accused and signed by him, after being taken in the presence and hearing of him (the Magistrate), and that it is a full and true account of the statement made by the accused. As in the present case there appears from the vernacular record to have been a substantial compliance with s. 346 of the old Code, we hold the statement of the respondent as admissible evidence, and taken in conjunction with the other proofs, as fully establishing his guilt of the crime with which he was charged. We therefore allow this appeal, and convicting Yakub Khan, son of Jamal Khan, Musalman, of Bonai, of an offence under s. 376 of the Penal Code, namely of rape, we direct that he be rigorously imprisoned for the period of five years, to be computed from the date of his committal to jail. The necessary orders will issue for his immediate arrest.