APPELLATE CRIMINAL.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

BHAGWAN (BHAGWANDIN) (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT).* 1929 *February* 15.

Criminal Procedure Code, (Act V of 1898), section 337, clause 2A—Where one accused is granted pardon, only the other accused must be committed to sessions—Approver where wrongly committed to sessions, irregularity, whether vitiates the trial.

Under section 337, clause (2A) of the Code of Criminal Procedure where a pardon has been granted to one accused the case against the other accused alone must be committed to sessions.

Where a Magistrate misinterpreted section 337(2A) of the Code of Criminal Procedure and committed the approver to sessions along with the accused and the Sessions Judge instead of referring the matter to the High Court in order to have the commitment quashed proceeded with the case as though there had been no commitment of the approver and the commitment was not really a commitment because the approver was not charged and was never put upon his defence and as he could not be tried because he had been given a pardon and the accused was not prejudiced in any way by the technical mistake committed by the Magistrate, *held*, that the procedure of the Sessions Judge was wrong, but the irregularity was one which did not vitiate the trial. *King-Emperor* v. *Peru and others* (1), followed.

Mr. *B. N. Roy*, for the appellant.

The Government Advocate (Mr. *G. H. Thomas*), for the Crown.

RAZA and PULLAN, JJ. :—Bhagwandin Lohar has been convicted of the murder of his wife Musammat Ram Dei. He has been sentenced to death and this sentence

*Criminal Appeal No. 44 of 1929, against the order of Pandit Raghubar Dayal Shukla, First Additional Sessions Judge of Lucknow at Bara Banki, dated the 18th of January, 1929.

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is before us for confirmation. He has submitted an appeal from jail and has been represented in this Court by a Counsel appointed by the Crown.

Raza, and Pullan, JJ.

There is no question that Musammat Ram Dei, wife of Bhagwandin, was murdered with a *gandasa* in her house on the night of 1st and 2nd of October, 1928. The murder was reported by the village chaukidar at 7 a.m. on the 2nd of October. In this report he did not give the name of any person as being the murderer, but he stated that he had been sent to make the report by Ajodhia Lohar. This Ajodhia Lohar is the uncle of the accused, and has been examined as a witness for the prosecution. He stated in court that he did not tell the chaukidar that Bhagwandin had murdered his wife, and this would appear to be the reason why Bhagwandin's name did not appear in the first report. There is however ample evidence that immediately after the crime was committed, that is, in the middle of the night Bhagwandin went to Ajodhia and to his other uncle Santu and told them that he had killed his wife. He subsequently made the same statement to a witness named Lalta who lives in the adjoining house and to the *mukhia* Ram Jiawan. Another man Mendai also states that he was present when the accused confessed his guilt in the presence of the *mukhia* and Ajodhia. Mendai is by caste a Bhujwa. Lalta is an Ahir. Ram Jiawan *mukhia* is a Kurmi and no reason is alleged why any of these persons should have made a false statement as to the confession of Bhagwandin. It is even more unlikely that his two uncles Santu and Adodhia would make such statements falsely. Apart from this extra-judicial confession there is clear evidence that after the Sub-Inspector came to the village Bhagwandin produced a blood-stained *dhoti* from the roof of the adjoining house and stated that he had been wearing it at the time of the murder. Another

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indication of the guilt of this man may be seen in his own conduct. Admittedly he knew that his wife was murdered shortly after midnight, yet he made no report to the police station, and he appears to have made no attempt to find out who killed his wife. Such conduct is unnatural and leads to the conclusion that he himself is the murderer.

Raza, and Pullan, JJ.

Bhagwandin was put upon his trial along with his daughter-in-law Musammat Sarjudei. This woman lived in the same house as her father-in-law and she was a widow. She herself says that she had an illicit connection with her father-in-law, and she produced before witnesses certain blood-stained garments which belonged to her, and which were worn by her, as she says, at the time of the murder. She made a confession before a Magistrate and she was offered a pardon in the Magistrate's Court. In accordance with this pardon she was examined on oath and made a statement which is not entirely in accordance with her first confession, but still is substantially the same on the most important points. She states that Bhagwandin planned the crime with her and asked her to call him in the night. It appears that he slept outside the house while the woman and children slept inside. Apart from the motive arising from their guilty connection it appears that there were constant disputes between Ram Dei and her daughter-in-law on account of their children. In her statement Sarjudei says that she called Bhagwandin into the house at midnight, and that he killed his wife with the *gandasa* while she looked on. She accounts for the blood-stains on her own clothes by saying that she took up the child who was sleeping near her mother in her lap and that the child was stained with blood. Sarjudei is an approver and her evidence must be regarded with suspicion. We do not consider that her explanation as to the blood-stains on her clothes is satisfactory and it does not

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agree with the statement that she made in the first instance. There she said that Bhagwandin took up the child. We have also considered the nature of the injuries inflicted on the deceased. There were many wounds, perhaps as many as fifteen, and many of them were only skin deep. It is true that the *gandasa* which we have seen is very light in weight and not sharp, but even so, we can hardly believe that all these injuries were inflicted by a man. It is more probable that Musammat Sarjudei herself inflicted some of them, but she has chosen to conceal this fact in her evidence. But apart from the evidence of Sarjudei we consider that the case is proved against Bhagwandin. It is proved by his own conduct, in particular by his confessions to his relations and the other villagers, and also by his production of the blood-stained *dhoti* from the adjoining roof. He now wishes to suggest for the first time that the murder was committed by Sarjudei alone, but this was not the case which he wished to set up in the court below. There he started a case implicating his neighbour Lalta, who according to him had illicit connection with Sarjudei. He had, however, no evidence of any kind to support this assertion and there is no reason to believe that it was true. It may be remarked that had the crime been committed by Sarjudei alone or by her with the assistance of some stranger there could be no reason for the uncles of the accused coming forward to give evidence against him.

Raza, and Pullan, JJ.

The case, as we have said, is sufficiently proved without the evidence of Sarjudei. We have been obliged to consider very carefully whether the trial was not vitiated by the procedure of the courts below in dealing with this woman as an approver. The Magistrate misinterpreted section 337 of the Code of Criminal Procedure and supposed that clause (2A) of that section directed him to

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commit the approver to sessions. He accordingly committed her along with Bhagwandin, and the learned Sessions Judge instead of referring the matter to this Court in order to have the commitment quashed proceeded with the case as though there had been no commitment. Undoubtedly the proper procedure for the Sessions Judge to adopt was that which has been adopted on previous occasions when a similar mistake has been made by Magistrates who persisted in misreading this section, but in our opinion the so-called commitment was not really a commitment because Sarjudei was not charged, and was never put upon her defence. In saying that he committed her to sessions, the Magistrate merely meant that she was to be put before the Sessions Judge at the time of the trial of Bhagwandin. She could not be tried firstly because she had been given a pardon, and secondly because she had never been charged. It is evident that she herself knew that she was not being tried, and that she was fully aware of the terms of the pardon which had been offered to her. This being so, although we are of opinion that the procedure of the Sessions Judge was wrong, we do not consider that the irregularity committed was one which vitiates the trial. As a matter of fact the accused was not prejudiced in any way by the technical mistake committed by the Magistrate.

Raza, and Pullan, JJ.

It is not necessary for us to explain section 337 again as this has already been done by the Judicial Commissioner of Oudh in the case of *King-Emperor* v. *Peru and others* (1). We may briefly state that the meaning of the section which the Magistrate has misinterpreted is simply that where a pardon has been granted to one accused the case against the other accused must be committed to sessions. We might also observe that a similar case was brought to the notice of the Judicial Commissioner of Oudh by one of us when a Sessions Judge

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in the year 1924, and a circular letter was issued to all Magistrates. It is to be regretted that this circular letter appears to have become dead, even although it was supplemented by a ruling reported in the *Oudh Law Journal*.

We are satisfied that the case has been fully proved against Bhagwandin and the sentence in this case must be one of death. We, therefore, dismiss this appeal, uphold the conviction and sentence and direct that Bhagwandin be hanged by the neck till he be dead.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.

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February 19.

LALA BAJRANGI LAL (DECREE-HOLDER-APPELLANT) *v.* RAM HARAKH (RESPONDENT OPPOSITE PARTY).*

Civil Procedure Code (Act V of 1908), *order* XXI, *rules* 71 84, 85 86 *and* 87—*Execution of decree—Decree-holder knowingly not getting a previous encumbrance mentioned in sale proclamation—Auction-purchaser refusing to deposit balance of sale money on knowing of the encumbrance—Re-sale and purchase by decree-holder—Auction-purchaser, whether liable for deficiency under order* 21, *rule* 71 *of the Code of Civil Procedure—Fraud—No person can be allowed to take advantage of his own fraud and wrong.*

Where a decree-holder knew that there was a previous encumbrance on a property but did not get the encumbrance mentioned in the sale-proclamations and at the auction sale the property was sold and purchased by the respondent who deposited 25 per cent. of his bid at once but when he came to know of the encumbrance he did not deposit the balance and the property was re-sold and purchased by the decree-holder

*Execution of decree Appeal No. 75 of 1928, against the decree of Pandit Dwarka Prasad Shukla Subordinate Judge of Partabgarh dated the 9th of August, 1928, upholding the decree of Pandit Data Ram Misra, Munsif of Partabgarh, dated the 3rd of May, 1928.