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have had occasion to point out that *Diwali* gambling was not to be considered an offence. I refer to *Ram Shankar* v. *King-Emperor* (1), and *King-Emperor* v. *Shankar Dayal* (2). In his explanation the learned Magistrate has attempted to differentiate both cases but he has not succeeded. I regret to say that I have recently seen several cases in which warrants have been issued to the police in order that they may interfere with persons engaged in *Diwali* gambling. In my opinion to issue such warrants is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. As I have already shown in this case no less than Rs. 290. have been collected from twenty-six persons and the Magistrate has expressed his intention of giving a reward to the police. I can only hope that no reward has been given. I accordingly accept this reference, set aside the convictions and direct that all the fines shall be returned. It is not, in these circumstances, necessary to consider the minor law point raised as to the applicability of section 562(1A) to cases under the Gambling Act.

Pullan, J.

Reference accepted.

APPELLATE CRIMINAL.

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

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July, 10.

MANNI (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT.)*

Criminal Procedure Code (Act V of 1898), section 164—Statement of a witness made behind the back of an accused, admissibility of—Witnesses—Evidence of a child witness, weight to be attached to.

Held, that the statement of a witness made under section 164 of the Code of Criminal Procedure behind the back of the accused cannot be properly used as evidence against him.

*Criminal Appeal No. 244 of 1930, against the order of I. M. Kidwai, Additional Sessions Judge of Bahraich, dated the 8th of May, 1930.

(1) (1916) 20 O.C., 4. (2) (1922) 9 O.L.J., 667.

The only object in recording such statement is to obtain a hold over the winess. *Puttu* v. *King-Emperor* (1), relied on.

There is no more dangerous witness than a young child. Any mistake or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate.

Mr. *B. B. Chandra*, for the appellant.

The Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

RAZA and PULLAN, JJ. :—Manni Ahir, a man of thirty years of age has been convicted of the murder of his wife and sentenced to death. The sentence is before us for confirmation and Manni has appealed against his conviction.

The girl Jugra, who died, was stated by her mother to be about fourteen years of age. It is in evidence that she had been married for about a year, that she was not on good terms with her husband and that she had run away from him more than once. Her body was found in the river Khurpehwa on the afternoon of the 16th of October by Musammat Surja. The chaukidar Sarju was told about the recovery of the body and he went to the place and found the body of Jugra lying naked on the bank of the river tied by a rope to a short bamboo stick. He found her mother Musammat Surja with it. The chaukidar went to the police station and made a report. Admittedly this report is based on the statement made by Musammat Surja. In that report he gave the gist of the evidence which has subsequently been produced in court. He said that on his enquiry Khemai's wife (Surja) said "that she (the corpse) was her daughter named Jugra who was married to Manni Ahir of Gurpurwa, that she used to live little at the place

(1) (1914) 17 O.C., 363.

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of her husband and used to run away to her parents' house, that therefore she had been killed by her husband, that the girl was at the place of her husband, that her grand-daughter, the daughter of Baldi, had gone along with her to her husband's place, that she returned in the evening on the day previous saying that her aunt had been killed by her uncle, that she and her people began to search for her from early morning that day and that they found the dead body in the river at that time." This fixes the time of the alleged murder on the night of the 14th and 15th of October and naturally the most important evidence in the case is that of the grand-daughter, the daughter of Baldi, whose name is Sukhrania, and who is said to have given the first information to her grandmother Surja of the commission of the crime. Sukhrania has been believed by the learned Sessions Judge. This child is six years of age. Her statement in court is that she and her grandmother Surja went to the house of the accused and that she (Sukhrania) was sleeping with Jugra and woke up on receiving a kick from her. She states that she saw the accused throttling his wife. He was sitting on her chest and when the child began to cry he told her to go to sleep. She says that she went to sleep. When she woke up in the morning she did not find Musammat Jugra. She found another woman who had been sleeping in the same house behind a partition of corn-bins and she asked her what had happened. This woman told her that Jugra had been beaten and had run away, and this is the story which she told to her grandmother on the same evening. She said nothing about the throttling, and although the learned Judge thinks it not unnatural that a child should describe throttling by the word beating, we are not of that opinion. We do not believe that anybody would describe the incident which the child now says she saw, as a beating. The learned Judge is clearly impressed by the child's statement. He says she did not give him the impression of having been

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tutored and there is no reason why any one should tutor her. Now Surja in her statement in court admitted that she suspected the accused from the first because there was no one else possible. She obviously believes in his guilt and her whole conduct throughout shows that she wishes that he should be convicted. The child is completely under her influence and could very easily be taught by her what she was to say in court. The Judge was impressed by the fact that Sukhrania caught her own throat with her hands and set her teeth to illustrate what she saw the accused doing. We are not impressed by this piece of acting which had previously been performed in the court of the Committing Magistrate. It does not appear to us to have been spontaneous, but rather to have been tutored along with the rest of her statement. There is no more dangerous witness than a young child. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate.

We find in this case that there is no evidence to corroborate the statement made by the child. There is no evidence that the woman was throttled. The cause of her death is entirely unknown. There is no evidence that her husband was present on the night on which she died, and it is uncertain that she died on the night which is stated to have been the date of her death. The Civil Surgeon who conducted the *post mortem* examination on the morning of the 18th of October, found that the woman had been dead for five or six days, that is to say, according to his opinion she died on the night of the 12th and 13th of October and not on the night of the 14th and 15th Doctors are frequently wrong on the difficult question of *post mortem* appearances. but

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as this body was in water, it would be expected that decomposition would be delayed and not accelerated, and it is surprising that if the woman really died on the night of the 14th and 15th of October the doctor should have placed her death some forty-eight hours earlier

Rees and Fullan, JJ.

We have been asked to consider a statement made under section 164 of the Code of Criminal Procedure by another woman Musammat Sarjudei who is said to have been actually present in the house on the night in question. This statement was excluded by the learned Sessions Judge and in our opinion he was right in so doing. A statement made under section 164 behind the back of the accused cannot be proprely used as evidence against him. The only object in recording such statement is to obtain a hold over the witness. This was the view expressed by Mr. Lindsay, Judicial Commissioner, in the case of *Puttu* v. *King-Emperor* (1) and we believe it to be a correct statement of law.

Another point used by the learned Judge against the accused is that he ran away and remained in hiding for over two months. We should be most reluctant to use this fact in any way against the accused. The man is an ignorant villager and according to his own statement he returned to his village from a short absence of seven days to hear that his wife had been drowned, that members of the family were shut up in the thana and that a report was made against him. If this statement is true, and there is no evidence to rebut it as the man was not seen any where either on the day when his wife is said to have been killed or later until he was arrested, we can only say that his conduct can easily be explained on the ground of fear, and fear is not necessarily caused by a guilty conscience.

The last point which we need consider is the alleged identification of *danda* or stick which was found tied to the body. Certainly three witnesses say that the *danda*

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belonged to the accused. It has no particular marks of identification and in our opinion it is very difficult for any one to say that this is the accused's *danda*. But even if it were so, it does not provide important evidence against its owner. Nor can we say how the *danda* was used. We cannot accept the explanation given by the learned Judge that it was fixed in the sand in the bed of the river in order to prevent the body from being washed away because we cannot imagine any one doing anything so foolish. A short stick like this could not retain its hold in a river bed even for a few minutes let alone for three or four days. Moreover all that we know from the chaukidar who may be considered to be an impartial witness is that when the body was lying on the bank it was tied by the rope to the stick. We are far from certain that when the body was in the water it was tied to the stick and we cannot understand the object with which any murderer could have so tied the body. It is at least probable that the stick and the rope were merely used to bring the body to the shore.

Raza and Pullan, JJ.

Viewing the case as a whole we are of opinion that there is no sufficient evidence to justify the conviction of the appellant of the offence of murder. We are not even certain that the woman was murdered. We, therefore, allow this appeal, set aside the conviction and sentence and declare the accused Manni to be acquitted.

Appeal allowed.