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I also agree that the plaintiff's suit is not barred by limitation inasmuch as the plaintiff and his predecessor took rent from the defendant and accepted him as a tenant of the land after the expiry of the lease. The defendants were therefore holding over as tenants under section 116 of the Transfer of Property Act. They were not trespassers but were recognized as tenants from year to year.

Article 139 of the Limitation Act has, therefore, no application to the present case. Nor is the suit barred by the proviso to section 42 of the Specific Relief Act for the relief No 2 claimed in this case expressly mentions that the plaintiff wants a declaration that the lease in question is temporary and resumable and that after the service of a due notice the plaintiff is entitled to evict the defendants. This relief implies that no notice to evict the defendants had been given by the plaintiff and that the defendants were at the time when the suit was filed treated as tenants from year to year. The lease had not been terminated and the right of re-entry therefore did not accrue to the plaintiffs. The proviso to section 42 will not, therefore, bar the present suit.

For all these reasons I agree with the view taken by my learned brother that the appeal should be decreed with costs.

S. A. K.

Appeal decreed.

APPELLATE CRIMINAL.

Before Adami and Bucknill, J. J.

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January, 14.

SHAMBHU KHATRI

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 304—*Rape of a girl under* 12—*rupture of vagina—death due to shock.*

* Criminal Appeal No. 187 of 1923, against the order of conviction and sentence passed by C. C. Chattarji, Esq., Magistrate exercising special power under section 30, Criminal Procedure Code, Hazaribagh, dated the 7th August, 1923.

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A youth of about 18 had, without any ancillary violence, sexual intercourse with a well-developed girl probably under 12 years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock; *held*, that as death is not the natural consequence to be expected from a simple sexual offence, the accused was not guilty, under section 304 of the Penal Code, of culpable homicide not amounting to murder.

The facts of the case material to this report are stated in the judgment of Bucknill, J.

Muhammad Yunus (with him *Manmathanath Pal*), for the appellant.

W. A. Akbari, for the Crown.

BUCKNILL, J.—In this case the appellant was charged with rape and culpable homicide not amounting to murder. He was convicted of both offences by a Magistrate (exercising special powers under section 30 of the Criminal Procedure Code) at Hazaribagh on the 7th of August last. On the charge of rape he was sentenced to four years' rigorous imprisonment, whilst on the charge of culpable homicide not amounting to murder he was sentenced to three years' rigorous imprisonment; such sentences to run consecutively.

The circumstances surrounding this case are of a peculiar description and must be detailed in order to decide accurately, as to of what offence, if any, the appellant was, if he was identified properly as the assailant, guilty. The appellant was a youth of about 18. The deceased was a girl whom the Assistant Surgeon describes as well developed though from her dentition she was probably under 12 years of age. The body of the girl was discovered naked partly immersed in mud under several feet of water in a tank and when examined by the Assistant Surgeon was in an advanced state of decomposition. It was clear, however, that death was not due to drowning; it was equally certain that the girl had suffered an extensive rupture of the vagina, such injury being ante-mortem

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in character. There was no other sign of any violence of any kind although owing to the decomposed state of the corpse it was not possible to have discovered any superficial injuries. In the opinion of the Assistant Surgeon the girl's death was due to shock caused by rupture of her vagina. There seems no doubt that sexual intercourse had been effected with this girl just before her death. The dentition of the girl indicated that she was under 12 and coupled with this the extensive rupture of the vagina and fourchette indicated perpetration of a rape. It is difficult, however, to see how, under the Indian Penal Code, in the circumstances just narrated any charge which would fall under the definition of section 299 of the Indian Penal Code and which would be punishable under section 304 thereof could be sustained. What it would appear clear must have been the case was that, after intercourse had been effected and the girl was found to have died, the body was taken and hidden under water. In English law there is no doubt that the perpetrator could have been properly indicted for murder or man-slaughter; but there seems no reason to think for one moment nor is there any evidence to show that the person who had sexual intercourse with the deceased did anything which any reasonable person would contemplate as being likely to cause injury which would result in the girl's death. In the course of many cases in which I have prosecuted or which I have tried of this character, I cannot recollect one which has resulted in death; and in the medical text-books there are but few instances (and those of extraordinary character) referred to in which death has occurred as the result of rape. In reported cases of resultant death which have come before the Courts there are as a rule to be noted features of some ancillary violence. I do not therefore feel that death can be regarded as any natural consequence to be expected from a plain sexual crime. I am satisfied that in the circumstances of this case the conviction under section 304 cannot be sustained and should in any case be quashed.

With regard to the facts in this case the evidence appears to me to be sufficient to prove satisfactorily that the appellant was the person who assaulted the girl. The principal evidence is that of a child of about 9 or 10 years old, who was P. W. No. 2, named Mori Bilia Chokri. Her evidence is simply to the effect that she went out with the deceased girl to gather lac but finding that there was none to be picked they went to a tank to drink water at the female *ghat*. The appellant was bathing at the male *ghat* and, coming up to them, offered them money if they would allow him to have sexual intercourse with them. The witness and the deceased began running away but the appellant caught the deceased, had sexual intercourse with her on the ground and then took her into the water. The witness fled home and told the deceased's brother P. W. 1, whose name is Rama Telia, what had happened. He ran at once to the tank and the witness following pointed out where the body of the girl lay hidden under the water.

Rama Telia corroborates the story told by the little girl and he himself, after the finding of the body, went to the police-station and lodged the first information. Now it is quite true that in the first information there is no direct statement made by the informant that the deceased had been raped although it is quite clearly therein stated that the appellant had offered her money to allow him to have connection with her. The suggestion in the first information was to the effect that the appellant drowned the deceased because she had refused to submit to his proposals. A great deal of comment was naturally made with regard to the absence from the first information of a definite charge of rape but it is abundantly clear that even when the Writer Head Constable (P. W. No. 6) came to the spot there was even then no distinct charge of rape being made against the appellant; as indeed the Writer Head Constable himself deposes. It is not, however, difficult to understand why this was so. The child who gave the alarm was not of an age at which she would fully

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understand all that had taken place between the appellant and the deceased or to have explained exactly what the appellant did to the deceased. It may indeed be the case that she did not actually see or (if she did see) understand at the time an act of sexual intercourse taking place; and, indeed, it seems hardly likely that the appellant, unless he was in an insane state of morbid sexual desire, would have done what it is alleged he did do without any attempt at retirement. One thing is, however, quite certain and that is that the little girl reported to the deceased's brother an affair which was concerned with sexual matters as well as the disposal of the deceased's body under the waters of the tank. What however is of very great importance is that the witness Rama Teli (the deceased's brother) on reaching the tank actually found the accused coming out of it and he was then and there caught.

The doctor's examination of the appellant's penis shows that he was suffering from an eruption on the glans penis and also inside the foreskin; these were slightly painful and were secreting a fluid which would cause irritation and itching and an abnormal desire for sexual intercourse.

The appellant in his statement denied that he had had anything to do with the deceased girl and said that he was plucking mangoes in a grove not far from the tank when he was seized by the villagers. At the trial he endeavoured to prove an *alibi* and called two witnesses. One of these stated that the appellant had been working at a brick kiln in the morning and had gone away towards a *bagicha* about mid-day. The other witness states that he saw the accused being taken by the villagers from near the *bagicha*. The Sub-Inspector, however, proves that there were no mangoes at all on any tree near the tank and there is ample evidence, in my opinion, to show that the accused was caught at the tank with his clothes wet. There is also, in my view, adequate testimony corroborative of the main features of the prosecution story which I have

outlined above. Several other persons arrived and saw the appellant in the hands of the deceased's brother, Rama Teli; his capture is vouched for by Hingo Teli (the uncle of Rama Teli) to whom at the tank the appellant was actually handed over by the latter; it is at this witness's house that the child-witness Bilia actually lived. Although it seems that, at first, those who were searching in the tank were unable to discover the body, there seems no doubt whatever that it was due to the child's pointing out the spot (where she said she had seen the body being disposed of) that it was discovered, in what is referred to as, neck-deep water; and her help in this respect is deposed to by more than one witness. There are two passages in the evidence of the little girl which have naturally been the subject of considerable comment on behalf of the appellant. Rama Teli deposes that, when he reached the tank and caught the appellant there, he asked the appellant what he had done with his sister. The appellant in reply said, that he did not know what had become of her. When Rama Teli could not see his sister or find her body anywhere he immediately sent one Lerua Teli to go to Jamuatanr (which was the place where the girls had gone in the morning in order to gather or see if they could gather lac) to ascertain if by chance the girl might be there; it was shortly after this that the little girl pointed out the place at the tank where she thought the body would be discovered and where in fact it was discovered. In the meantime Lerua Teli went to Jamuatanr and saw the man in charge there whose name is Duma Khatri; but, of course, the girl was not there and Duma and Lerua then came to the tank and Duma Khatri was in fact the person who actually found the corpse.

Now, in her evidence in cross-examination, the child Bilia stated that she went with Lerua to Duma Khatri's house searching for the deceased. This would, if correct, undoubtedly be a very curious thing to do if she knew what had really taken place with regard to the deceased. But to the Court, on being

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more carefully questioned upon the subject, she replied that she had not in fact gone to Jamuatanr and the Magistrate, in his decision, points out that the question put to her in cross-examination was placed in her mouth in a leading form and that he did not think that she, in answering in the affirmative, understood exactly what she was being asked in cross-examination; and his own questions subsequently put to her upon this point satisfied him that she had not understood the question. The second circumstance in the child's evidence was that at one stage of her cross-examination she stated that there were blood marks at the place where the deceased girl had been thrown down; but there is no evidence to indicate that any blood marks were discovered on the land although Rama Teli says that there were some signs of a struggle and the impression of a body. Again, the Magistrate himself questioned this girl as to her statement relative to the blood marks and to him the child quite clearly stated that there were none which she had seen. The Magistrate is satisfied that the child did not understand the leading question put to her by the cross-examining pleader as to *how many* blood marks she had seen. From the absence of blood marks the Magistrate seems to come to the conclusion that the rape might have been committed in shallow water. He states, moreover, in his decision that he carefully watched the demeanour of the child when she was giving her evidence and he was satisfied that, from the manner in which she related her story and answered questions, she was telling the truth. It is perhaps impossible to expect from so youthful a witness as Bilia any very precise narrative of what she actually saw; but, whether the outrage took place on the dry ground or at the water's edge or in the water, there is no doubt that she at once gave the alarm to Rama Teli implicating the appellant in some sexual impropriety and in what she not unnaturally thought was the drowning of the deceased. To what extent the sexual attack had gone was obviously not known to any one

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at the time; for we do not find any account of any examination of those parts of the body affected until such is made by the doctor. After very careful consideration I have come to the conclusion that the appellant has been rightly convicted of rape.

BUCKNILL, J.

I have at an earlier stage of my decision given my reasons for thinking that the conviction and sentence passed against the appellant in connection with the charge against him of culpable homicide not amounting to murder must be set aside: but it will be observed that the sentence of 3 years' rigorous imprisonment imposed under section 304 and of 4 years' rigorous imprisonment in respect of the rape were made consecutive punishments. If the sentence of 3 years' rigorous imprisonment imposed in connection with section 304 is set aside, the appellant will have at present only to undergo a period of 4 years' rigorous imprisonment, *i.e.*, in respect of the rape. I have no doubt that this is not an adequate punishment and notice must issue upon the appellant to show cause why the sentence passed upon him in connection with his conviction for rape should not be enhanced.

ADAMI, J.—I agree.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J.J.

MUSSAMMAT BHAGWATIA

v.

KING-EMPEROR.*

1924.

January, 14.

Penal Code, 1860 (*Act XLV of* 1860), *section* 494—*Bigamy—Abetment of bigamy—Venue of trial—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 531.

The High Court has power to quash a committal order committing an accused person to stand his trial in a Session Court which has no territorial jurisdiction at the place where the alleged offence was committed.

*Criminal Revision No. 605 of 1923, against an order of commitment by S. Senapati, Esq., I.C.S., Magistrate, 1st Class, Buxar, dated the 29th August, 1923.